117 199

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~217.~~ 9

THE STEAMER "HARRISBURG;" EDWIN M. LEWIS, FRANKLIN B. GOWEN, AND STEPHEN A. CALDWELL, RECEIVERS OF THE PHILADELPHIA AND READING RAILROAD COMPANY, OWNERS OF SAID STEAMER, APPELLANTS,

vs.

EMMA S. RICKARDS, AND MARY E. RICKARDS BY HER NEXT FRIEND, EMMA S. RICKARDS, WIDOW AND DAUGHTER OF SILAS E. RICKARDS, LATE FIRST OFFICER ON BOARD THE SCHOONER "MARIETTA TILTON."

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED APRIL 14, 1883.

legal remedies, all claims and obligations due, or to become due, given, or that may be given, to said company, and all stock due, or to become due, to said company shall be payable to and collectible by said corporation; and the individual members of said corporation shall, each and singular, be liable for the corporate debts of said company, contracted while a member of the same, to the amount of his share of the corporate property.

SEC. 5. Said corporation shall have power to bring water from the Santiam River to any place or places in or near Salem, to be brought as far as practicable through the channel or the valley of Mill Creek; and for such purpose may enter upon lands, and also said creek, and do all things proper and suitable for a safe, direct, and economical conveyance of water as aforesaid; but said corporation shall do no unnecessary injury to private property, and shall be answerable in damages to any person whose property is injured by its acts.

SEC. 6. Said corporation shall have the exclusive right to the hydraulic powers and privileges created by the water which it takes from the Santiam River, and may use, rent, or sell the same, or any portion thereof, as it may deem expedient.

SEC. 7. This act shall be in force from and after its passage.

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EMMA S. RICKARDS, AND MARY E. RICKARDS BY HER NEXT FRIEND, EMMA S. RICKARDS, WIDOW AND DAUGHTER OF SILAS E. RICKARDS, LATE FIRST OFFICER ON BOARD THE SCHOONER "MARIETTA TILTON."

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania in the Third Circuit.

EMMA S. RICKARDS and MARY E. RICKARDS, by her next friend EMMA S. RICKARDS, widow and daughter of Silas E. Rickards late first officer on board of the schooner "Marietta Tilton," Libellants and Appellees,

vs.

THE STEAMER "HARRISBURG" and EDWIN M. LEWIS, FRANKLIN B. GOWEN, and STEPHEN A. CALDWELL, Receivers of the Philadelphia and Reading Railroad Company, owners of the said steamer, Respondents and Appellants.

UNITED STATES OF AMERICA, } *ss:*
Eastern District of Pennsylvania, }

Pleas and proceedings before the honorable the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit of October Session, 1882, No. 4.

2 It is thus contained:

Be it remembered, that on the 22nd day of August, A. D. 1882, the proctors for the respective parties, came into our said court here, and filed the record of the district court of the United States for the eastern district of Pennsylvania, which, being read, is as follows, to wit:

In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

EMMA S. RICKARDS and MARY E. RICKARDS, by her next friend, EMMA S. RICKARDS, Emma being the widow and Mary the daughter of Silas E. Rickards, deceased, who was the first officer of the schooner "Marietta Tilton." } No. 8 of 1882.

vs.

THE STEAMER "HARRISBURG."

Pleas before the honorable the judge of the district court of the United States for the eastern district of Pennsylvania.

It is thus contained:

Be it remembered, that on the twenty-fifth day of February, A. D. 1882, Curtis Tilton and Henry Flanders, Esq's, proctors of said court, come into the said court and exhibit the libel and complaint of Emma S. Rickards and Mary E. Rickards, widow and daughter of Silas E. Rickards, deceased, late first officer of the schooner "Marietta Tilton,"
3 against the steamer "Harrisburg," in a cause of damages for death arising from collision, civil and maritime, which, being read and filed, is in the words and figures following, to wit:

1 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania in the Third Circuit.

EMMA S. RICKARDS and MARY E. RICKARDS, by her next friend EMMA S. RICKARDS, widow and daughter of Silas E. Rickards late first officer on board of the schooner "Marietta Tilton," Libellants and Appellees,

vs.

THE STEAMER "HARRISBURG" and EDWIN M. LEWIS, FRANKLIN B. GOWEN, and STEPHEN A. CALDWELL, Receivers of the Philadelphia and Reading Railroad Company, owners of the said steamer, Respondents and Appellants.

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania,* } *ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit of October Session, 1882, No. 4.

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Be it remembered, that on the 22nd day of August, A. D. 1882, the proctors for the respective parties, came into our said court here, and filed the record of the district court of the United States for the eastern district of Pennsylvania, which, being read, is as follows, to wit:

In the District Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

EMMA S. RICKARDS and MARY E. RICKARDS, by her next friend, EMMA S. RICKARDS, Emma being the widow and Mary the daughter of Silas E. Rickards, deceased, who was the first officer of the schooner "Marietta Tilton."

vs.

THE STEAMER "HARRISBURG."

} No. 8 of 1882.

Pleas before the honorable the judge of the district court of the United States for the eastern district of Pennsylvania.

It is thus contained:

Be it remembered, that on the twenty-fifth day of February, A. D. 1882, Curtis Tilton and Henry Flanders, Esq's, proctors of said court, come into the said court and exhibit the libel and complaint of Emma S. Rickards and Mary E. Rickards, widow and daughter of Silas E. Rickards, deceased, late first officer of the schooner "Marietta Tilton," against the steamer "Harrisburg," in a cause of damages for
3 death arising from collision, civil and maritime, which, being read and filed, is in the words and figures following, to wit:

To the Honorable William Butler, judge of the district court of the United States, in and for the eastern district of Pennsylvania:

The libel of Emma S. Rickards and Mary E. Rickards, by her next friend Emma S. Rickards, both of the county of Sussex, in the State of Delaware, against the steamer "Harrisburg," and all persons lawfully intervening for their interest in the same, in a cause of damages, civil and maritime, alleges as follows:

1. On the evening of the 16th of May, 1877, a little before nine o'clock, a collision occurred between the schooner "Marietta Tilton," of Philadelphia, and the steamer "Harrisburg," which resulted in the entire loss of the schooner and the drowning of six of her crew.

2. That Silas E. Rickards, deceased, late of Sussex county aforesaid, was the first officer on board of said schooner at the time of said collision, and was one of those of said schooner's crew who were drowned. He was the husband of Emma S. Rickards aforesaid, and the father of the said Mary E. Rickards. That the said collision and the drowning of the said Silas E. Rickards were caused solely by the improper navigation and fault of said steamer, as hereinafter set forth.

3. That the place where the said collision and the drowning of the said Rickards occurred was about one hundred yards from Cross Rip lightship, off the coast of Massachusetts and upon the high seas; the night was unusually clear, the moon shining in her first quarter, and objects were distinctly visible at a long distance; the vessels having actually sighted each other when they were about four miles apart.

4. At the point where the collision occurred the channel
4 was nearly a mile wide, the lightship being on its southern side, and there being a sufficient depth of water for the passage of the steamer in any part of it.

5. The steamer was pursuing a westwardly course heading for the lightship, on a line almost due west and which would have passed slightly north of the lightship. This course she maintained without any deviation or reduction of speed until the moment of the collision.

6. The schooner was sailing eastwardly on a voyage from New York to Boston. She was properly manned and equipped and her signal lights were brightly burning, and when the vessels were more than two miles apart she was considerably (a half mile or more) north of the line of the steamer's progress and northwestward of the lightship. She pursued her course, which was directly towards the lightship, and upon a line which was oblique to that of the steamer's course, exposing her port light to the steamer. This was the course laid down in the sailing directions for vessels bound eastward, and she kept it steadily.

7. The approaching vessels were thus sailing toward Cross Rip lightship, upon intersecting lines. Cross Rip was the focal point of their courses, and when the "Tilton," sailing steadily and without deviation from her course, reached it, the steamer, going at full speed, ran stem on into her port side. The blow crushed her side

and shattered her spars. She sank in a moment, and six of her crew, including the said Silas E. Rickards, drowned.

8. The law gave the right of way to the "Tilton," and required her to keep her course, which she did. It imposed upon the steamer the duty of slowing up, stopping or changing her course, neither of which she did. These omissions caused the collision and the loss of life attending it, and for them the steamer is in fault. She is in fault further for attempting without necessity to pass between the "Tilton" and the lightship when there was a broad unobstructed channel outside of both of these vessels. She did not make diligent exertion to rescue the drowning crew of the "Tilton," and is in fault for this neglect.

9. That those facts stated herein which determine the steamer's liability for all the injurious consequences of said collision have been ascertained by the decree of the circuit court for the district aforesaid, in a cause wherein the owners of said schooner were libellants, and the owners of said steamer the respondents (being No. 20, of October sessions, 1878, in which a final decree was entered November 1st, 1881), and the said conclusions of fact are therein indisputable and of final and conclusive obligation upon said steamship.

10. That the said Silas E. Rickards, at the time of his drowning as aforesaid, was twenty-eight years of age, and in good physical health. That he and the said Emma S. Rickards were married on the ninth day of January, 1877, four months prior to said collision, and the said Mary E. Rickards, their only child, was born November 27th, 1877, six months after said collision. That the said Emma S. Rickards was well and comfortably maintained and provided for by her said husband in his lifetime, but is now without means of support, and such is her destitution that she has been obliged to separate herself from her said child, and forego its proper training in her effort to provide for it a maintenance.

11. That the libellants, in the death of the said Silas E. Rickards, and in the desolation of their home by the negligence and fault of said steamship as aforesaid, have sustained an injury and loss in a large amount, to wit, in the sum of $10,000 and upwards, for which loss they claim to have a maritime lien upon said steamship. That there have not intervened in divestment of said lien any innocent rights to be affected by its present enforcement, nor has there been any delay in the assertion of said lien at all injurious to the owners of said steamer.

6 12. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

13. That the said steamship is now lying in the port of Philadelphia, in the district aforesaid, and within the jurisdiction of this court.

Whereupon the libellants pray that process in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against said steamer "Harrisburg," her boilers, machiney, tackle, apparel, and furniture, and that all persons having any interest therein, may be cited to appear and

answer all and singular the matters aforesaid, and that this honorable court will be pleased to decree the payment of the damages aforesaid, and that the said vessel may be condemned and sold to pay the same, and that the libellants may have such other and further relief as in law and practice they may be entitled to.

EMMA S. RICKARDS.

Sworn to and subscribed, upon knowledge, information, and belief, before me, this twenty-fifth day of February, A. D. 1882.

W. W. CRAIG, *Pro Clk.*

And thereupon Thomas Hart, Jr., proctor on behalf of Edwin M. Lewis, Stephen A. Caldwell, and Franklin B. Gowen, receivers of the Philadelphia and Reading Railroad Company, owners of the said steamer "Harrisburg," comes into court and prays leave to offer objections on behalf of said receivers to the allowance of process of attachment as prayed for in said libel, and afterwards, to wit, on the twenty-first day of March, A. D. 1882, the cause is heard upon the question of said allowance and the objections thereto, and after argument
7 by the proctors of the respective parties aforesaid, it is ordered that upon the libellants entering stipulation with sufficient security in the sum of $250 for costs, process of attachment issue against the said steamer "Harrisburg," and it is further ordered that upon claim being made by the owners of said steamer or in their behalf, stipulation be required of said claimants in the sum of $5,000.

And afterwards, to wit, on the fourth day of April, A. D. 1882, stipulation for costs is entered, and thereupon process of attachment issues.

And afterwards, to wit, on the eighth day of April, 1882, Stephen A. Caldwell makes claim to said steamer on behalf of himself, Edwin M. Lewis, and Franklin B. Gowen, receivers of the Philadelphia and Reading Railroad Company.

And afterwards, to wit, on the eleventh day of April, 1882, stipulation on behalf of the claimants is entered.

And afterwards, to wit, on the thirteenth and twenty-ninth days of April, A. D. 1882, Edwin M. Lewis and others, the receivers as aforesaid, present, by their proctor, Thomas Hart, Jr., Esq., their exceptions to the libel aforesaid, and the same being filed are in the words and figures following, to wit:

In the District Court of the United States in and for the Eastern District of Pennsylvania. No. 8 of 1882.

Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, receivers of the Philadelphia and Reading Railroad Company, claimants of the said steamer "Harrisburg", except to the libel of Emma S. Rickards and Mary E. Rickards, by her next friend, against said steamer "Harrisburg":

8 I. Because it appears by said libel that the collision in consequence of which it is alleged libellants became entitled to damages, happened upon May 16th, 1877, and that by the statute of the

State of Pennsylvania, approved April 26th, 1855, entitled "An act relating to damages for injuries producing death," it is provided that the action (in such cases) "shall be brought within one year after the death, and not thereafter."

II. Because this court has not jurisdiction of the cause of action set out in the libel, inasmuch as the death occurred in the year 1877.

III. Because the cause of action set out in the libel is barred by lapse of time.

IV. Because this court, governing itself by the analogies of the act of Assembly of Pennsylvania of April 26th, 1855, should not entertain a libel brought nearly five years after the collision out of which it is alleged the cause of action arises.

V. Because there is no jurisdiction in the admiralty courts of the United States in a case of death upon navigable waters alleged to have arisen in consequence of negligence in any other way or upon any other terms and conditions than are given by the State statute governing the locality where the death occurred, or governing the vessel (by reason of its ownership and registry), the alleged negligent acts of those on board of which occasioned the death; and because the libel does not set out any such statutes, either of Pennsylvania, Massachusetts, the United States, or any other State.

THOMAS HART, JR.,
For Claimants and Exceptants.

April, 1882.

VI. Because the said libellants are not entitled to sue for or to recover in this honorable court the damages claimed to have been suffered by them as alleged in the libel.

9 VII. Because there is no lien upon the said steamer "Harrisburg" for the damages claimed by the libellants, and this honorable court has no jurisdiction to enter a decree therefor against the said steamer.

VIII. Because the said libel is insufficient and does not set forth a cause of action within the jurisdiction of this honorable court.

Wherefore the said claimants pray that the said libel may be dismissed with costs.

THOMAS HART, JR.,
For Claimants.

April 27th, 1882.

And afterwards, to wit, on the 16th day of May, A. D. 1882, the cause comes on to be heard upon the libel and the exceptions filed thereto by the receivers aforesaid, and is argued by the proctors of the respective parties, and after partial hearing the exceptions to the libel, with the assent of the proctor for the receivers aforesaid, are dismissed *pro forma* without prejudice and reserving the question involved.

And afterwards, to wit, on the twenty-fourth day of May, A. D. 1882, Thomas Hart, Jr., Esq., proctor as aforesaid, comes into court and exhibits the answer of Stephen A. Caldwell, Edwin M. Lewis, and Franklin B. Gowen, receivers of the Philadelphia and Reading Railroad Company, owners of the steamer "Harrisburg," to the libel

and complaint aforesaid, and the same being filed is in the words and figures following, to wit:

To the honorable William Butler, judge of the district court of the United States, in and for the eastern district of Pennsylvania.

The answer of Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, receivers of the Philadelphia and Reading Railroad Company, owners of the steamship "Harrisburg," to the libel of Emma S. Rickards and Mary E. Rickards, by her next friend
10 Emma S. Rickards, against the said steamship "Harrisburg" in a cause of damage, civil and maritime, expressly reserving all exceptions to the said libel and to the jurisdiction of this court for the causes and matters particularly specified in the exceptions to the said libel, filed April 13th, 1882, and in the additional exceptions, filed April 29th, 1882, and insisting thereupon with the same effect as if they were herein repeated at length, alleges as follows:

First. That while the said respondents do not admit that the collision mentioned in the said libel and the drowning of some of her crew were caused by the improper navigation and fault of the said steamer, they say that it is true that, in the proceeding referred to in the ninth article of the said libel, a final decree was entered by the circuit court of the United States for this district against the said steamer, and that the respondents do not intend to contest in the present proceedings the conclusions of fact therein found by the said court, and that they do not therefore further answer to the articles of the said libel wherein the circumstances of the said collision are set forth, save to deny that after the said collision the said steamer did not make diligent exertion to rescue the drowning crew of the schooner "Tilton." On the contrary, the said steamer immediately stopped, lowered a boat, and made every effort possible to save the crew of the said schooner, two of whom were found and taken on board the steamer. None of the others could be seen, though the said steamer came to an anchor and laid at the place of the collision all night. At daylight the steamer weighed anchor and steamed around the wreck without discovering any others.

Second. The respondents deny that the said collision took place upon the high seas, and aver that Cross Rip lightship, near which the said collision occurred, lies in a sound of the sea called
11 Nantucket sound, embraced between the coast of Massachusetts and the islands of Martha's Vineyard and Nantucket, parts of the said State of Massachusetts, and within the territorial limits of that Commonwealth, and that by the statute law of the Commonwealth of Massachusetts, Statutes of 1860, chapter 63, sections 98 and 99, it is provided in cases of death arising from negligence that a fine may be recovered by indictment and paid to the executor or administrator, and that such indictment shall be prosecuted within one year from the injuries causing the death.

Third. That the said steamer "Harrisburg" was at the time of the said collision engaged in the coasting trade and belonged to the port of Philadelphia, in the Commonwealth of Pennsylvania, at which place she was then duly enrolled according to the act of Congress in

such case made and provided, and that by the statute law of Pennsylvania, acts of April 15th, 1851, and April 26th, 1855, it is provided that the action therein given in cases of death occasioned by negligence shall be brought within one year after the death and not thereafter.

Fourth. The respondents have no knowledge of the facts stated in the tenth paragraph of the said libel.

Wherefore the said respondents deny the right of the said libellants to recover, and pray that the said libel may be dismissed with costs.

STEPHEN A. CALDWELL,
For himself, and
EDWIN M. LEWIS AND
FRANKLIN B. GOWEN,
Receivers.

THOMAS HART, JR., *Proctor.*

Sworn to and subscribed before me, this twenty-fourth day of May, 1882, by Stephen A. Caldwell.

JOHN B. BEAVER,
Pro Clerk Dist. Ct., U. S.

12 And afterwards, to wit, on the ninth day of June, A. D. 1882, this cause having come before the court upon libel and answer, and it appearing to the court that the allegations of the answer do not contain a good and sufficient defense to the cause of action set forth in the libel, it is ordered, adjudged, and decreed that the libellants do recover the amount of the damages by them sustained by reason of the matters alleged in the libel herein, from the Philadelphia and Reading Railroad Company, respondents, and Stephen A. Caldwell and the Philadelphia Trust and Safe Deposit and Insurance Company, their stipulators, with costs to be taxed.

And afterwards on the same day, by agreement in writing filed, it is agreed that the damages in this case be assessed at the sum of three thousand dollars.

This assessment is made *pro forma* in accordance with the verbal indication of the judge of this honorable court, in order to facilitate an appeal and obtain an argument upon the questions involved before the judges both of the district and circuit courts of the United States for this district, and it is not to be binding on either of the parties as an agreed assessment of damages, or to be given in evidence as to the amount thereof, but in the circuit court the damages are to be reassessed *de novo* before a commission to be appointed by the court, if a decree be entered for libellants.

CURTIS TILTON,
For Libellants.
THOMAS HART, JR.,
For Respondents.

And thereupon, upon the filing of the agreement fixing the amount of damages due the libellants herein, it is ordered, adjudged,

and decreed that the libellants, Emma S Rickards and Mary E. Rickards, do recover of the Philadelphia and Reading Rail-
13 road Company, respondents, and of Stephen A. Caldwell, and the Philadelphia Trust and Safe Deposit and Insurance Company, their stipulators, the sum of three thousand dollars ($3,000), with their costs to be taxed.

And afterwards, to wit, on the fifteenth day of June, A. D. 1882, the respondents by their proctor Thomas Hart, Jr., pray leave to appeal from the decree of the district court, in this case, to the next circuit court of the United States for the eastern district of Pennsylvania, and the same is allowed upon the usual conditions.

UNITED STATES, }
Eastern District of Pennsylvania, } *ss:*

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the said district court in a certain plea, civil and maritime, for damages for death arising from collision, therein lately depending, wherein Emma S. Rickards and Mary E. Rickards, by her next friend Emma S. Rickards, are the libellants against the steamer "Harrisburg," and Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, receivers of the Philadelphia and Reading Railroad Company, owners of the said steamer, respondents.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court at Philadelphia, this tenth day of July, A. D. 1882, and in the one hundred and seventh year of the Independence of the United States.

[SEAL] W. W. CRAIG,
Pro Clerk.

14 And afterwards, to wit, on the 16th day of January, A. D. 1883, this appeal coming up for argument, and being argued by the proctors for the respective parties, the court enter the following decree, to wit:

EMMA S. RICKARDS and MARY E. RICKARDS, by her next friend, EMMA S. RICKARDS, widow and daughter of Silas E. Rickards, *vs.* THE STEAMER "HARRISBURG" and EDWIN M. LEWIS & *al.*, Receivers of the Philada. and Reading Railroad Company.	Of October Session, 1882, No. 4.

And now, January 16th, 1882, this cause came on to be heard upon libel and answer, and thereupon it is ordered, adjudged, and decreed that the libellants do recover their damages and costs of the respondents and their stipulators, and that the damages of the said libellants are now reassessed at the sum of fifty-one hundred dollars.

15 *The Finding of Facts and Conclusions of Law upon which the Court Renders its Decree.*

In the Circuit Court of the United States for the Eastern District of Pennsylvania. In Admiralty.

EMMA S. RICKARDS and MARY E. RICKARDS, by her next friend, EMMA S. RICKARDS, Emma being the widow and Mary the daughter of Silas E. Rickards, deceased, who was the first officer of the schooner "Marietta Tilton,"

vs.

THE STEAMER "HARRISBURG."

I. The Facts.

1. On the evening of the 16th of May, 1877, a little before nine o'clock, a collision occurred between the schooner "Marietta Tilton," of Philadelphia, and the steamer "Harrisburg," which resulted in the entire loss of the schooner and the drowning of six of her crew.

2. That Silas E. Rickards, deceased, late of Sussex county aforesaid, was the first officer on board of said schooner at the time of said collision, and was one of those of said schooner's crew who
16 were drowned. He was the husband of Emma S. Rickards aforesaid and the father of the said Mary E. Rickards.

3. The facts causing and attending the said collision and determining the steamer's liability for its consequences have heretofore been ascertained by the decree of this court, entered November 1, 1881, against the steamer, in a cause wherein the owners of the said schooner were libellants and the owners of said steamer the respondents, being No. 20 of October sessions, 1878, and the same are not contested in this proceeding.

They are as follows:

On the evening of the 16th of May, 1877, a little before nine o'clock, a collision occurred between the schooner Marietta Tilton, of which the libellants were owners, and the steamer Harrisburgh, which resulted in the entire loss of the schooner and her cargo and in the drowning of six of her crew—all but two of those who were aboard of her.

The night was unusually clear, the moon shining in her first quarter, and objects were distinctly visible at a long distance, the vessels having actually sighted each other when they were about four miles apart.

At the point where the collision occurred the channel was
17 nearly a mile wide, the light-ship being on the southern border of it, and there being a sufficient depth of water for the passage of the steamer in any part of it.

The steamship was pursuing a westwardly course, heading for the lightship, upon a straight line which would pass slightly north of it, or, in the language of the mate, "I ported my bow and headed my ship for the lightship, keeping the light a little on my port bow." This course she maintained without any deviation or reduction of her speed.

The schooner was sailing eastwardly and when she was first seen by the steamer her position was considerably (not less than a half mile) north of the line of the steamer's progress and so northwestward of the lightship. When the vessels were at a safe distance apart the schooner luffed a little to the windward and thence sailing on the wind, which was from the southwest, she pursued a course directly toward the lightship upon a line which was oblique to that of the steamer's course, exposing her port light to the steamer. This was the course laid down in the sailing directions for vessels bound eastward and she kept it steadily.

18 The courses of the vessels thus converging to the lightship, they must necessarily have moved upon intersecting lines.

When they were within three or four hundred feet of each other and the peril was imminent, the schooner ported and the steamer starboared her helm and ran stem on into the port side of the schooner and sank her.

4. That the place where the said collision and the drowning of the said Rickards occurred was about one hundred yards from Cross Rip lightship, which lies in a sound of the sea called Nantucket sound, embraced between the coast of Massachusetts and the islands of Martha's Vineyard and Nantucket, parts of the said State of Massachusetts.

5. That the said steamer "Harrisburg" was at the time of the said collision engaged in the coasting trade and belonged to the port of Philadelphia, in the Commonwealth of Pennsylvania, at which place she was then duly enrolled according to the act of Congress in such case made and provided.

6. No innocent rights to or in the said steamer have arisen between the date of said collision and the exhibition of the libel.

19 *II. Conclusions of Law.*

I. By the statute law of the Commonwealth of Massachusetts, Statutes of 1860, chapter 63, sections 98 and 99, it is provided in cases of death arising from negligence that a fine may be recovered by indictment and paid to the executor or administrator, and that such indictment shall be prosecuted within one year from the injuries causing the death.

II. By the statute law of Pennsylvania, acts of April 15th, 1851, and April 26th, 1855, it is provided that the action therein given in cases of death occasioned by negligence shall be brought within one year after the death and not thereafter.

III. In the admiralty courts of the United States the death of a human being upon the high seas or waters navigable from the sea, caused by negligence, may be complained of as an injury, and the wrong redressed under the general maritime law.

IV. The right of the libellants does not depend upon the
20 statute law of either the States of Massachusetts or Pennsylvania, and the limitation of one year in the statutes of these States does not bar this proceeding.

V. Although an action in the State courts of either Massachusetts or Pennsylvania would be barred by the limitation expressed in the statutes of those States, the admiralty is not bound thereby, and in

this case will not follow the period of limitation therein provided and prescribed. The drowning complained of was caused by the improper navigation, negligence, and fault of the said steamer producing the collision aforesaid, and the libellants are entitled to recover

VI. As there are no innocent rights to be affected by the present proceedings and no inconvenience will result to the respondents from the delay attending it, the action, if not governed by the statutes aforesaid, is not barred by the libellant's laches.

By the court.

A. McKENNAN,
Cir. Judge.

21 And afterwards, to wit, on the 30th day of January, A. D. 1883, Thomas Hart, Jr., Esq., proctor for respondents, appears in open court and prays an appeal to the Supreme Court of the United States, which is allowed in the following words as follows, to wit:

RICKARDS *et al.*, Libellants & Appellees,
vs.
ST'R HARRISBURG *et al.*, Respondents & Appellants.
} No. 4. October Sess., 1882.

And now, January 30th, 1883, Thomas Hart, Jr., Esq., proctor for the respondents and appellants in above-entitled cause, appearing in open court, prays an appeal from the decree of this honorable court made in this cause upon January 16th, 1883, to the Supreme Court of the United States, and the same is allowed, with security in the sum of seven thousand dollars.

22 In the Circuit Court of the United States, in and for the Eastern District of Pennsylvania in the Third Circuit.

EMMA S. RICKARDS and MARY E. RICKARDS, by her next friend EMMA S. RICKARDS, widow and daughter of Silas E. Rickards, late first officer on board the Schooner "Marietta Tilton," Libellants & Appellees,
vs.
THE STEAMER "HARRISBURG," and EDWIN M. LEWIS, FRANKLIN B. GOWEN, and STEPHEN A. CALDWELL, Receivers of the Philadelphia and Reading Railroad Company, owners of said Steamer, Respondents and Appellants.
} No. 4. October Sess., 1882.

Know all men by these presents, That we, Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, receivers of the Philadelphia and Reading Railroad Company, owners of the steamer "Harrisburg," and respondents and appellants in above action, and The Philadelphia Trust Safe Deposit and Insurance Company, and Thomas M. Richards, residing at No. 1509 No. 19th St., Philadelphia, are held and

firmly bound unto the above-named Emma S. Rickards and Mary E. Rickards, libellants and appellees in above action, in the sum of seven thousand dollars ($7,000), to be paid to the said Emma S. Rickards and Mary E. Rickards, libellants and appellees as aforesaid, their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our respective successors, heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this seventeenth day of February, A. D. 1883.

Whereas, lately at a circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in the said court between Emma S. Rickards and Mary E. Rickards, by her next friend Emma S. Rickards, widow and daughter of Silas E. Rickards, late first officer on board the schooner "Marietta Tilton," libellants and appellees, and the steamer "Harrisburg," and Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, receivers of the Philadelphia and Reading Railroad Company, owners of said steamer, respondents and appellants, a final decree was rendered against the said the steamer "Harrisburg," and Edwin M. Lewis, and Franklin B. Gowen, and Stephen A. Caldwell, receivers of the Philadelphia and Reading Railroad Company, owners of said steamer, respondents and appellants, and the said Edwin M. Lewis, and Franklin B. Gowen, and Stephen A. Caldwell, receivers of the Philadelphia and Reading Railroad Company, owners of the steamer "Harrisburg," respondents & appellants, having taken an appeal, which appeal has been allowed by the said circuit court, to the Supreme Court of the United States, to reverse the said decree in the aforesaid suit:

23 Now the condition of this obligation is such that if the said Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, receivers of the Philadelphia and Reading Railroad Company, owners of the steamer "Harrisburg," respondents and appellants, shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their appeal good, then this obligation to be null and void; otherwise, to remain in full force and virtue.

EDWIN M. LEWIS, [L. S.]
F. B. GOWEN, [L. S.]
S. A. CALDWELL, [L. S.]
Receivers of the Philadelphia & Reading Railroad Company.
THE PHILADELPHIA TRUST, SAFE DEPOSIT, AND INSURANCE COMPANY, [L. S.]
By J. L. ERRINGER, *Prest.*

Attest: W. L. DUBOIS, [L. S.]
Secretary.
THOMAS M. RICHARDS. [L. S.]

Sealed and delivered in the presence of—
The word "successors" having been interlined between "respective" and "heirs," on 16th line from bottom of preceding page.
A. FOSTER.
C. H. QUARLES.
A. FOSTER.
C. H. QUARLES.

Sureties approved: WM. BUTLER, *Judge.*

[Endorsed:] No. 4. October sess., 1882. Circuit court United States. Rickards *et al. vs.* St'r Harrisburg. Bond *sur* appeal. Filed February 26, 1883.

24 THE UNITED STATES OF AMERICA, *ss:*

To Emma S. Rickards and Mary E. Rickards, by her next friend Emma S. Rickards, widow and daughter of Silas E. Rickards, late first officer on board the schooner "Marietta Tilton," Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, for the eastern district of Pennsylvania in the third circuit, wherein the steamer Harrisburg and Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, receivers of the Philadelphia and Reading Railroad Company, owners of the steamer, appellants, and you are appellees, to show cause, if any there be, why the decree rendered against said appellants, as in said appeal mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this fifth day of March, in the year of our Lord one thousand eight hundred and eighty-three.

WM. BUTLER, *Judge.*

We accept service of the above writ.

CURTIS TILTON.
HENRY FLANDERS.

Mar. 30, '83.

25 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original record in the cause of Emma S. Rickards and Mary E. Rickards, by her next friend Emma S. Rickards, &c., libellants and appellees, *vs.* The Steamer "Harrisburg" and Edward M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, receivers of the Philada. & Reading R. R. Co., &c., respondents and appellants, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this thirteenth day of April, in the year of our Lord one thousend eight hundred and eighty-three, and of the Independence of these United States the one hundred and seventh.

[Seal U. S. Circuit Court, E. D. Pennsylvania. *E. pluribus unum.*]

SAMUEL BELL,
Clerk of C. C.

26 *Assignments of Error.*

In the Supreme Court of the United States. October Term, 1882.

THE STEAMER "HARRISBURG," EDWIN M. LEWIS, FRANKLIN B. GOWEN and STEPHEN A. CALDWELL, Receivers of the Philadelphia & Reading Railroad Company, owners of said steamer, Appellants,
vs.
EMMA S. RICKARDS and MARY E. RICKARDS, by her next friend EMMA S. RICKARDS, widow and daughter of Silas E. Rickards, late first officer on board of the schooner "Marietta Tilton," Appellees.
} No. 1248.

I. The court below, the circuit court of the United States for the eastern district of Pennsylvania, erred in entering the decree of January 16, 1882, that the libellants recover their damages and costs of the respondents and their stipulators.

II. That said court erred in finding as a conclusion of law (being the third) that "in the admiralty courts of the United States the death of a human being upon the high seas or waters navigable from the sea, caused by negligence, may be complained of as an injury and the wrong redressed under the general maritime law."

III. The said court erred in finding as a conclusion of law (being the fourth) that "the right of the libellants does not depend upon the statute law of either the States of Massachusetts or Pennsylvania, and the limitation of one year in the statutes of those States does not bar this proceeding."

IV. The said court erred in finding as a conclusion of law (being the fifth) that "although an action in the State courts of either
27 Massachusetts or Pennsylvania would be barred by the limitation expressed in the statutes of those States, the admiralty is not bound thereby and in this case will not follow the period of limitation therein provided and prescribed."

V. The said court erred in finding as a conclusion of law (being the sixth) that "the drowning complained of was caused by the improper navigation, negligence, and fault of said steamer, producing the collision aforesaid, and the libellants are entitled to recover."

VI. The said court erred in finding as a conclusion of law (being the seventh) that, "as there are no innocent rights to be affected by the present proceeding and no inconvenience will result to the respondents from the delay attending it, the action, if not governed by the statutes aforesaid, is not barred by the libellants' laches."

VII. The said court erred in not dismissing the libel of the said libellants.

April 24, 1883.

THOMAS HART, JR.,
Proctor for Appellants.

28 [Endorsed:] No. 1248. Oct., 1882. Supreme Court of the United States. The Steamer "Harrisburg," Edwin M. Lewis, & *al.*, appellants, *vs.* Emma S. Rickards & others, appellees. Assignments of error.

Supreme Court U. S. 1882, October term. No. 859. The Steamer "Harrisburg," Edwin M. Lewis, *et al.*, app'ts, *vs.* Emma S. Rickards & *al.* Assignment of errors. Office Supreme Court U. S. Filed Apr. 24, 1883. James H. McKenney, clerk. Filed 24th April, 1883.

Endorsed on cover: E. Pennsylvania C. C. U. S. No. 217. The Steamer "Harrisburg," Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, receivers of the Philadelphia and Reading Railroad Company, owners of said steamer, appellants, *vs.* Emma S. Rickards and Mary E. Rickards, by her next friend, Emma S. Rickards, widow and daughter of Silas E. Rickards, late first officer on board the schooner "Marietta Tilton." Filed 14th April, 1883.

119-99

FILED
MAR 26 1886
JAMES H. McKENNEY,
CLERK.

No. 217. *October Term, 1885.*

Supreme Court of the United States.

The Steamer "Harrisburg," Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, Receivers of The Philadelphia and Reading Railroad Company, owners of said Steamer, Appellants,

vs.

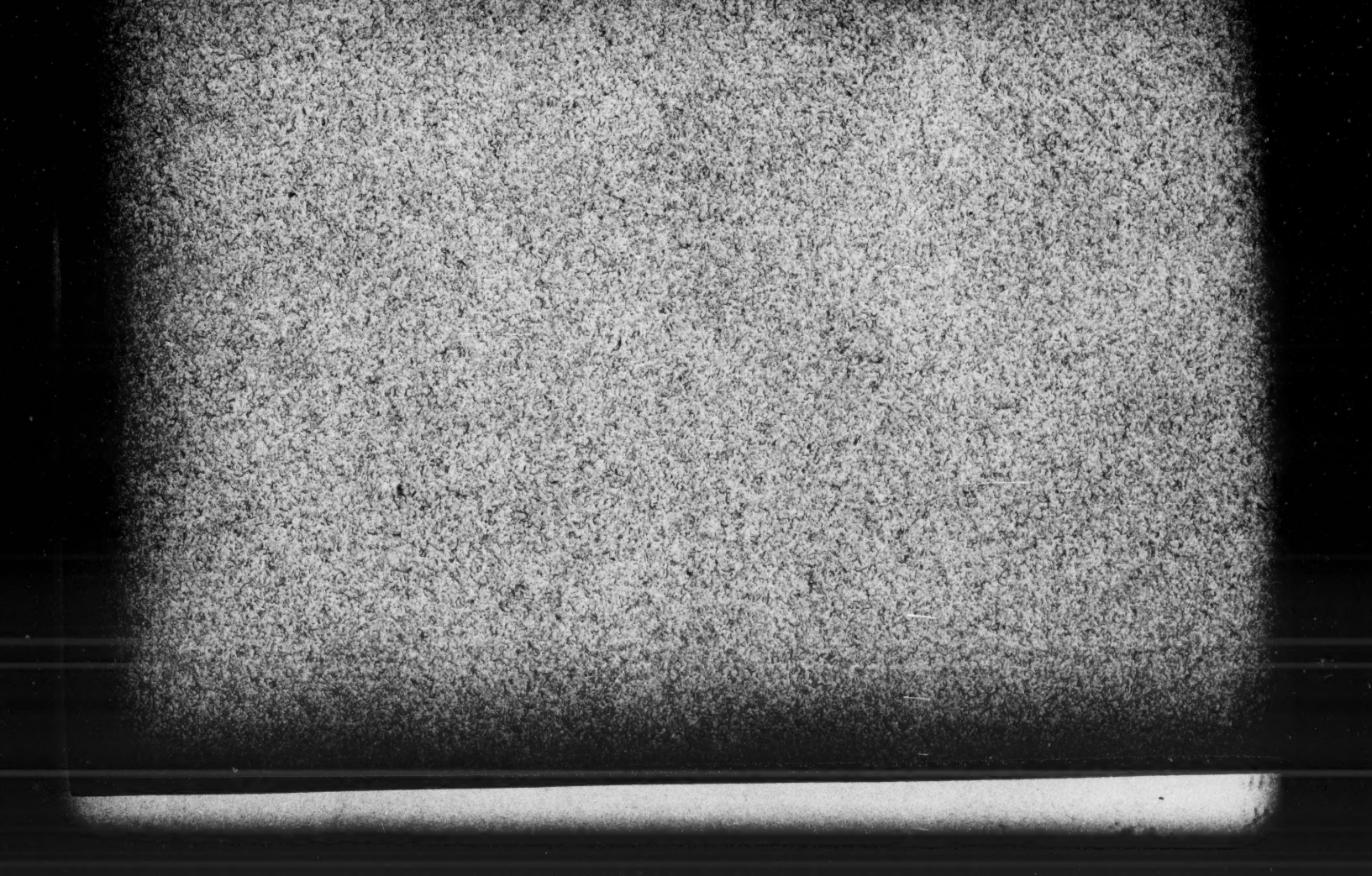
Emma S. Rickards and Mary C. Rickards, by her next friend Emma S. Rickards, widow, and daughter of Silas E. Rickards, late first officer of Schooner "Marietta Tilton."

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

APPELLANTS' PAPER-BOOK.

THOMAS HART, JR.

Allen, Lane & Scott, Printers, 229-231 South Fifth Street, Philadelphia.



In the Supreme Court of the United States.

The Steamer "Harrisburg," Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, Receivers of The Philadelphia and Reading Railroad Company, owners of said steamer, appellants,

vs.

Emma S. Rickards and Mary E. Rickards by her next friend, Emma S. Rickards, widow and daughter of Silas E. Rickards, late first officer on board the Schooner "Marietta Tilton."

October Term, 1885.
No. 217.

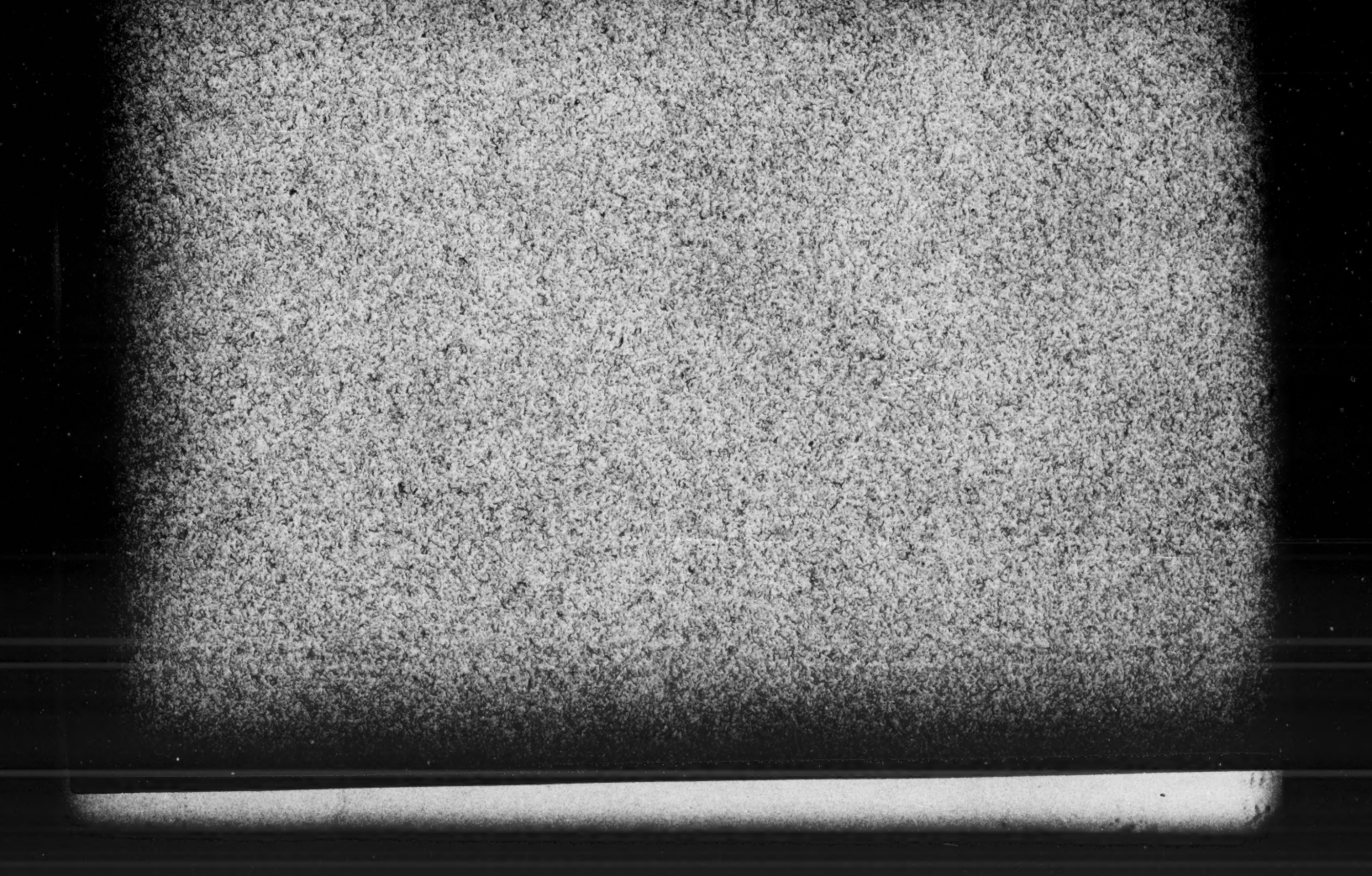
APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLANTS.

I. A Concise Abstract or Statement of the Case.

On the evening of May 16th, 1877, a collision occurred between the schooner "Marietta Tilton," of Philadelphia, and the steamer "Harrisburg," also of the said city, which resulted in the loss of the schooner and the drowning, among others, of her first officer, Silas E. Rickards.

The place where the collision occurred was about one hun-



In the Supreme Court of the United States.

The Steamer "Harrisburg," Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, Receivers of The Philadelphia and Reading Railroad Company, owners of said steamer, appellants,

vs.

Emma S. Rickards and Mary E. Rickards by her next friend, Emma S. Rickards, widow and daughter of Silas E. Rickards, late first officer on board the Schooner "Marietta Tilton."

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V. The said court erred in finding as a conclusion of law (being the sixth) that "the drowning complained of was caused by the improper navigation, negligence and fault of said steamer producing the collision aforesaid, and the libellants are entitled to recover."

VI. The said court erred in finding as a conclusion of law (being the seventh) that, "as there are no innocent rights to be affected by the present proceeding, and no inconvenience will result to the respondents from the delay attending it, the action, if not governed by the statutes aforesaid, is not barred by the libellants' laches."

VII. The said court erred in not dismissing the libel of the said libellants.

III. Brief of Argument.

The questions raised in this case are:—

I. Can the death of a human being upon the high seas or waters navigable from the sea, caused by negligence, be complained of in the admiralty as an injury and wrong to be redressed under the general maritime law administered by the United States Courts?

II. If this question should be determined affirmatively, will the United States admiralty courts permit a recovery therefor on a libel filed nearly five years after the death?

The question whether a proceeding *in rem* can be maintained is subordinate to the first. If it be answered in the affirmative, a maritime lien would arise. If, on the contrary, the right to recover be wholly dependent on the State statute of either Pennsylvania or Massachusetts, it would not arise, for there can be, in that case, no recovery at all.

These are certainly very interesting questions. The main one has lately been the subject of much discussion, and of a great number of decisions in the various United States District and Circuit Courts, none of which, however, has reached this Honorable Court.

There are, however, some expressions of this court upon the subject.

In the case of Steamboat *vs.* Chase, 16 Wall., 522, Judge Clifford, speaking on the question whether an action lay in the admiralty, in case of death, said (page 532): "Difficulties, it must be conceded, will attend the solution of this question, and it is not necessary to decide it in the present case." That was a case at law in a State court, *in personam.*

A few years later (1876), however, this court in Sherlock *vs.* Alling, 3 Otto, 99, rather takes it for granted that in the absence of a statute regulation by Congress, touching the liability of parties for marine torts, resulting in the death of persons injured, the statute of the State controlling the locality, though it be navigable water, alone applies. That was a case in the State Court of Indiana, arising out of a collision in the river Ohio. The statute of Indiana was attacked as applied to cases where the injuries complained of were caused by marine torts as interfering with the power of Congress over the regulation of commerce. The court said (p. 102): "The position of the defendants, as we understand it, is that both by the common and maritime law, the right of action for personal torts dies with the person injured. The statute which allows action for such torts, when resulting in the death of the person injured, to be brought by the personal representative of the deceased, enlarges the liability of parties for such torts, and that such enlarged liability, applied to cases of marine torts, would constitute a new burden on commerce;" and then considered this last point, without discussing or controverting the proposition first mentioned. The learned judge (Field, J.) continued (page 104):—

"Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, and that it constitutes no encroachment upon the commercial power of Congress."

The remarks of Ch. J. Waite, in *Ex parte* Gordon, 104 U. S., 515, would seem to show that the Supreme Court had no idea that there could be a recovery in the admiralty independently of legislation governing the locality or the vessel which was in fault. It

was upon the ground that the admiralty had jurisdiction to enforce a liability under a State statute giving a right of action in case of death, that the writ of prohibition was refused. "*It is no doubt true,*" he says, "*that down to within a comparatively recent period the courts of admiralty, both in England and in this country, have followed the rule of the common law in respect to such actions, and have decided that damages for such wrongs were not recoverable;* but since Lord Campbell's Act, in 1846, it has been provided by statute in England and in most of the States of the Union that suits may be brought in the courts of common law for the benefit of those having a pecuniary interest in the life of one who has been killed by the wrongful act of another to recover such damages as they may have sustained in consequence of the wrong that has been done, and we think it is clearly within the power of the courts of admiralty to determine whether *this legislation* has not wrought a corresponding change in the laws which govern their jurisdiction."

And Mr. Morton P. Henry, the latest writer (1885), says, Admiralty Jurisdiction and Procedure, page 75: "These acts (Lord Campbell's and the State statutes following it) can, however, have no extraterritorial jurisdiction; and such a cause of action is believed to be unknown to the general maritime law, as it certainly was to the system of maritime law adopted in the admiralty courts of the United States under the constitutional grant in maritime causes. And see note 2 for references and a further discussion of the subject."

The appellants submit that the decree of the Circuit Court should be reversed, and the libel in this case should be dismissed, because there is no law under which it is maintainable except the statute law of either Massachusetts or Pennsylvania (there is no United States statute on the subject), and by both of them it is barred by the limitation of time therein provided. That the death of a person upon navigable waters, caused by the negligence of another, cannot be complained of as an injury to be redressed under the general maritime law; that such a right depends solely upon the statute law governing the *locality* where the death took place, or if upon the high seas, upon the statute law of the State to which the vessel causing the injury belonged.

The answer avers that the locality of the collision was within the Commonwealth of Massachusetts and the finding of fact is in accord therewith.

The statutes of that State (in force in 1877, the time of the collision), Statutes of 1860, chapter 63, sections 98 and 99, provided in case of death by negligence for a fine to be recovered by indictment, *to be prosecuted within one year from the injury causing the death.*

The answer also states and the fact is so found, that the "Harrisburg" belongs to the port of Philadelphia, so that if its liability be not governed by the law of the locality of the collision, it must be by that of the State of Pennsylvania.

The statutes of that State, acts of April 15th, 1851, and April 26th, 1855, Purdon (1883), 1267–8, provide that "the action (for damage for injury causing death) shall be brought *within one year and not thereafter.*

It is to be remarked here that the libellants must have thought the statutes of Pennsylvania applicable. The wife and child of Silas E. Rickards, the only persons entitled, by the law of that State (see Lehigh Iron Company *vs.* Rupp, 100 Pennsylvania State Rep., 95), have sued. But if the cause of action be independent of Pennsylvania law, there is no sound reason which would give the libellants an exclusive right. The common law made no distinction between the wife and children and the parents of the deceased. None were entitled. Now, if the existence of a right to recover in a case of this kind is to be determined "by natural equity and the general principles of law" (which Judge Sprague said in Cutting *vs.* Seabury, were in favor of it) it is impossible for one to say just who are entitled to recover and in what manner and proportion. There are many cases in which the actual loss to parents by the death of a son may be greater than that which falls upon his wife and children. In the absence of a statute, what is to determine the rights of the surviving relatives? Who are entitled to sue? How shall the amount recovered be divided?

In the consideration of the question in this case, it is to be premised that the *jurisdiction* of the admiralty need not be denied.

The right given by the statute of Pennsylvania may certainly (within a year of the cause of action) be enforced in the United States court, if the death occurred upon navigable waters within Pennsylvania, or upon the high seas, upon or in consequence of the acts of a Pennsylvania vessel.

This jurisdiction is not *given* by the State statute. Jurisdiction is conferred in consequence of the matter being one of a maritime nature. The *right* is given by the State statute, and it may be enforced, in a case within the statute, arising upon navigable matters, in the admiralty.

In the case of *Ex parte* McNeill, 13 Wall., 243, where a libel was sustained under a State statute allowing pilotage fees to the pilot who first tenders his services, Mr. Justice Swayne says: "The State law cannot give jurisdiction to any Federal court. *But that is not the question in this case.* A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, admiralty or of common law. *The statute in such cases does not confer the jurisdiction; that exists already,* and it is invoked to give effect to the right by giving the appropriate remedy. *This* principle may be laid down as axiomatic in our national jurisprudence."

See also Railroad Company *vs.* Whitton, 13 Wall., 270.

It is upon this same principle that this court lately (January, 1882), in *Ex parte* Gordon, *supra,* refused to issue a writ of prohibition to restrain a United States district court from proceeding in a case of libel against a vessel for damages, for drowning certain persons in consequence of a collision between said vessel and another, in which the former was to blame. The decision by C. J. Waite goes upon the theory that a *prohibition* can only issue to restrain an unlawful assumption of *jurisdiction,* and that consequently when a prohibition is applied for, *the question presented is not whether a libellant can recover in the suit which he has begun, but whether he can go into a court of admiralty to have his rights determined.* That as the court had jurisdiction in respect to the collision, it followed that it had jurisdiction to hear and determine what liability, if any, the

vessel had incurred thereby. In that case the libellants claimed to recover, if it should be decided that their right to do so did not exist on general principles of admiralty law, upon the statute law of either Maryland or Virginia, whichever should be held applicable to the case. The collision occurred in Chesapeake bay, within the territorial limits of those States, both of which had statutes upon the subject of actions in case of death by negligence. See paper-book against the petition, pages 4, 13 and 14.

It is proposed in this brief, in the first place, in view of the very great number of decisions which have been made upon the subject in hand by the Circuit Courts of the United States, to give them an attentive consideration.

It will be found that aside from one or two of these, they do not sustain the position that a libel *in rem* can be supported in a case like the present one, independently of State statute law.

In this examination it will be well to start with the case of the Towanda, 34 Leg. Int., 394, a case in the Circuit Court of Pennsylvania decided in 1877, because it is one of the first and because in the present case, reported below in 15 Fed. Rep., 610, the case of the Towanda was followed without a new examination of the subject.

The judgment of the court in that case was undoubtedly right, for the "Towanda" was a Philadelphia vessel and the statute law of Pennsylvania applied. There was nothing in the case opposed to a recovery *under the statute*, as there is here, namely, the lapse of time. It is true, the learned judge does not found his opinion upon the Pennsylvania statute, but so far as the case is rested upon previous decisions, there is no doubt it cannot now be sustained.

In the first place, an examination of the opinion shows that the court did not consider that there was a different rule in admiralty from that of the common law. It did not admit the common-law rule as now understood, and hold that it did not apply in the admiralty. On the contrary, it was the opinion of the court that the common-law rule was not as declared by Lord Ellenborough in Baker *vs.* Bolton, 1 Campb., 493, and that the contrary cases of Ford *vs.* Monroe, 20 Wend., 210,

The right given by the statute of Pennsylvania may certainly (within a year of the cause of action) be enforced in the United States court, if the death occurred upon navigable waters within Pennsylvania, or upon the high seas, upon or in consequence of the acts of a Pennsylvania vessel.

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In this examination it will be well to start with the case of the Towanda, 34 Leg. Int., 394, a case in the Circuit Court of Pennsylvania decided in 1877, because it is one of the first and because in the present case, reported below in 15 Fed. Rep., 610, the case of the Towanda was followed without a new examination of the subject.

The judgment of the court in that case was undoubtedly right, for the "Towanda" was a Philadelphia vessel and the statute law of Pennsylvania applied. There was nothing in the case opposed to a recovery *under the statute*, as there is here, namely, the lapse of time. It is true, the learned judge does not found his opinion upon the Pennsylvania statute, but so far as the case is rested upon previous decisions, there is no doubt it cannot now be sustained.

In the first place, an examination of the opinion shows that the court did not consider that there was a different rule in admiralty from that of the common law. It did not admit the common-law rule as now understood, and hold that it did not apply in the admiralty. On the contrary, it was the opinion of the court that the common-law rule was not as declared by Lord Ellenborough in Baker *vs.* Bolton, 1 Campb., 493, and that the contrary cases of Ford *vs.* Monroe, 20 Wend., 210,

James *vs.* Christy, 18 Mo., 162, and Sullivan *vs.* Railroad, 3 Dillon, C. C., 334, had certainly unsettled, at least in this country, the common law on the subject.

But this matter is not now in doubt, for the common-law rule, as declared in Baker *vs.* Bolton, has since 1877 been authoritatively settled to be good law, and all the contrary cases cited above are overruled.

In New York, by the case of Green *vs.* Hudson River R. R. Co., 2 Keyes, 294, holding that a husband cannot maintain an action for the instantaneous killing of his wife through another's negligence.

In the United States courts, for in the very same month and year in which the "Towanda" was decided, the Supreme Court of the United States, in the case of Insurance Company *vs.* Brame, 5 Otto, 754, settled the law upon this question against the view taken by Judge Dillon. There A killed B, upon whose life there was a policy of insurance in favor of a third party. The company paid the insurance and sued A for the damages it had sustained by his act. Held, that the action did not lie at a common law, nor under the Civil Code of Louisiana, where the homicide was committed. Mr. Justice Hunt said: "The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. * * *No deliberate well-considered decision to the contrary is to be found.*"

Neither Green *vs.* R. R. Co., nor Ins. Co. *vs.* Brame, are referred to in the case of the "Towanda."

And in Dennick *vs.* Railroad Company, 13 Otto, 11, where it was held that a New York administrator could sue in New York to recover damages under a New Jersey statute for a death caused by injuries received in the latter State, Mr. Justice Miller said (page 21): "The right to recover for an injury to the person resulting in death is of very recent origin, and *depends wholly upon the statutes of the different States.*"

Even where there was the relationship of master and servant (a case distinguishable from that of husband and wife), it is settled in England that there can be no recovery by the mas-

ter in a case of instantaneous killing: Osburn *vs.* Gillett, 8 Exch., 88.

In Pennsylvania the common-law rule has never been questioned, and the acts of 1851 and 1855, *supra*, form the basis of every case upon the subject in that State.

There is a very interesting paper upon this subject, sustaining the soundness of the common-law rule, by Mr. R. C. McMurtrie, in the *American Law Review*, February 1882, page 128, in which the writer suggests a better reason for the rule than that usually assigned, in cases of action by a wife and children for the death of a husband and father, namely, that neither wife nor children have any legal "property" in the labor of a husband or father. They have no ownership in his labor. They certainly can not sue in his lifetime if he be injured or incapacitated. The capacity to labor is *his* property, and he alone can sue in such a case. He owes a *duty* to his wife and children, but they have no legal right against a third person, if the means of performing that duty be impaired or shall cease altogether.

So far, therefore, as the case of the "Towanda" goes upon a denial of the common-law rule, it must be conceded it can not now be sustained.

The other cases referred to in the "Towanda" as establishing the right to recover in the admiralty by the general maritime law are Cutting *vs.* Seabury, 1 Sprague's Dec., 525; the "Sea Gull," Chase's Dec., 148; and the "Highland Light," *Id.*, 150.

A short examination of each one will show that none of them is to be relied upon, and should not be followed as a precedent.

Cutting *vs.* Seabury was the first case in which the question was considered. But Judge Sprague treated the whole subject of recovery in case of death through negligence as one of general jurisprudence, which he did not consider as being then (1860) yet settled, even by the common law. It has been shown to have been settled since. He, however, expressed no decided opinion upon the subject (for he held in Crapo *vs.* Allen, 1 Sprague, 184, that "for mere torts, the right of action by the general maritime law, as by the civil law, dies with the

person injured") and the libel was dismissed upon other grounds. He certainly made no attempt to distinguish between a court of common law and a court of admiralty, and to assert that the law upon the subject was not uniform in both. This case cannot, therefore, be cited as one sustaining the idea that the general maritime law is different from the common law, and gives itself an action in case of death by negligence.

The "Sea Gull," also reported in 2 Amer. L. Times Reports, 15 (1869), in which the late Chief Justice Chase decreed in favor of the libellant, is the case which may be said to be responsible for what error now exists upon this subject. The opinion is valueless as to any discussion of the subject, and so far as it proceeds upon authority, is utterly baseless. It cites certain remarks of Sir Leoline Jenkins, but which are not correctly quoted. The matter referred to is to be found on page 774 of Wynne's Life (Ed. 1724), and was written about 1674. There is absolutely nothing in it, but the now familiar principle that one who has suffered personal injury from a marine tort, may *himself* libel *in rem* the offending ship.

It is as follows:—

To the Right Honorable the Lords Commissioners of the Admiralty:—

My Lords: "The merchants, freighters of the two English vessels, the 'Dove' of Bridlington, and the 'Elizabeth' of Yarmouth, as also the respective owners and masters of those vessels, have, as I conceive, a good action of spoil and damage, as we term it against the Dutch 'Caper' that detained and robbed them. Nor do I know that this action can be anywhere but before your Lordships in the Court of Admiralty, where the merchants and owners are to proceed by process against the man-of-war and commander, in order to be repaired; the first for the loss of their goods laden on and taken out of the several veseels; the other of their loss of time, and the violences whereby they were forced out of their course. And though what the English have been forced by torture to confess should be true in fact, viz., that their lading did belong to French subjects, yet this 'Caper' was not to meddle with them, it being express in the 35th Article of the Marine Treaty of Breda, that English

Bottoms shall make their goods free who happen to be enemies with the Dutch.

"This being the case, your Lordships will I doubt not find cause to assert an article so beneficial at this time to the English trade and not suffer so open a violation of it to go unpunished.

"As for the way of punishing the captain for his violences and menaces of torture and death; as also those of his officers for torturing our pilot with such barbarous and unmanly cruelties; the regular way is at a sessions of Oyer and Terminer for the admiralty. There we proceed by jury, and in all things according to the course of the common law; but the commission we had always on foot for that effect is upon the resignation of his Royal Highness, no longer in force, and as I humbly conceive, must be renewed in your Lordships' names.

"In the meantime, these men may be committed to the Marshalsea, and their ships continue under-arrest 'till the owners of Flushing do give bail to the action of the merchants, or else may be sold by decree of the court to prevent its perishing, in case the setters out appear not to defend it. All which, &c.

"L. JENKINS."

The next citation of the Chief Justice is the "Maverick," 1 Sprague, 23, which he accepts as a sufficient authority. But that was also a case of personal injury to the libellant; the "Maverick," a steamboat, running against a warp and breaking the leg of the libellant, on board a brig which had put out the warp. These authorities, with a reference to the now rejected common law cases of Ford and Monroe and James and Christy, (*supra*) which were said to have been approved in Cutting *vs.* Seabury, are the only support for the assertion of Judge Chase that the admiralty law gives of itself a remedy in a case like the present.

The last case referred to in the "Towanda" is the "Highland Light," also a decision of the late Chief Justice. It is also to be found in 2 Am. Law Times Rep., 118. But the jurisdiction there was sustained on the ground of the *locality* of the wrong, and the libellants were held entitled to redress (for damages occasioned by steam escaping from a collapsed steam chimney)

upon the United States statute of July 7th, 1838, section 13, amd upon the Maryland statute, which gave an action in case of death. The court said: "The right is quite separate from the remedy. The right, like that of a statute lien upon vessels for repairs in home ports, may be enforced in admiralty by its own processes."

This examination of the decision of the court below in the case of the "Towanda" shows, it is submitted, that the decree below should not be affirmed without further discussion. It remains to take up the subsequent decisions in other districts, of which there are now a great many, and see how they have treated the subject.

Very many of them are complicated by the existence of State statutes governing the locality of the tort or of the vessel committing it. Such cases are well sustainable upon such ground, and it will be found that most of them recognize the position that any liability in case of death upon navigable waters must be based upon the statutes which have changed the common law upon this subject. *So far as they consider the question as one of authority governing the admiralty courts, they have no other support than Chief Justice Chase's decisions, before examined.*

In the "D. Reeves," 5 Hughes, 89 (1879), Morris, D. J., considered that the question was not an open one in the Fourth Circuit. He said he felt bound by the case of the "Sea Gull," which was conceded to be contrary to the common law and the admiralty decisions in England.

Holmes *vs.* O. & C. Railway Company, 5 Fed. Rep., 75; S. C., 6 Sawyer, 262 (1880), was a suit brought to recover for a death caused by defendant's negligence while transporting decedent across a river in Oregon. The libellant claimed to recover under the statute of that State. The *jurisdiction* of the admiralty was sustained upon the ground of the *locality of the tort;* and while the court considered the cases of the "Sea Gull," Cutting *vs.* Seabury, and the "Highland Light," it did not rest the decision thereon, but expressly on the statute of Oregon, which, it was decided after an exhaustive consideration, could be enforced in the admiralty. The libel was *in personam.*

See a subsequent hearing, on the merits of this case, *Ibid.*,

page 523, showing that the damages were recovered under section 367 of the Oregon Civil Code.

There is another case in the same court (D. C. of Oregon). The Clatsop Chief, 5 Fed. Rep., 163. The libellant, the administrator of the decedent's estate, put the action on the ground of the statute law of Oregon, as well as upon the general admiralty law. Judge Deady said (page 167): "The fourth exception (that the matter is not within the admiralty jurisdiction of the United States and of this court) is disallowed. The question raised by it was decided in Holmes *vs.* O. & C. Railway Company, 5 Fed. Rep., 75, in which it was held that a marine tort is one that occurs on any navigable waters of the United States, and that damages *given by a State statute* for such a tort may be recovered in the proper district court in admiralty."

Another case about this same time (1879), that of Armstrong *vs.* Beadle, 5 Sawyer, 484, is in point. That was a libel for death of a wife by alleged negligence on the high seas. It was founded on the Code of California, giving a right of action in case of death by negligence. Sawyer, C. J., decided that the statute had no extraterritorial operation. He said: "*Unless the statute in question gives the right of action, the plaintiff cannot recover.*" It will be noticed that the point, of the vessel being one belonging to the State of California was not made, and it does not appear to what State it belonged.

But Plummer *vs.* Webb, 1 Ware, 74, which is sometimes cited, is not applicable. That was a libel in *personam* by a father for an assault and battery on his minor child whereby he died. The District Judge held that the action was for the labor and service of which the father had been deprived by the beating and that the fact of the death did not deprive the libellant of his action. In the same case in the Circuit Court, 4 Mason, 380, the libel was amended so as to set out a contract between the libellant and respondent for the service of the boy and the case was considered by Judge Story only upon the question whether the contract was a maritime one within the jurisdiction of the admiralty.

In re Long Island Transportation Company, 5 Fed. Rep., 599, Judge Choate, while saying that there is some authority

for the proposition that the rule of the common law that no action lay in case of death, is not the rule of the maritime law, and referring to the "Sea Gull" and other cases before spoken of, goes on to say, however that might be, that here there was a right under the municipal law governing the place of the transaction and the parties to it, and that the admiralty courts in the exercise of their jurisdiction over marine torts should recognize and enforce the right so given.

In Rusk *vs.* The Charles Morgan, 18 Am. L. Reg., N. S., 624, S. C., 2 Flippin, 274, the death took place upon a boat on the Mississippi between New Orleans and Cincinnati, though no State statute is referred to. District Court Judge Swing reviews the cases, but without expressing an opinion thereon; sustaining the jurisdiction upon the ground of the uncertainty of the point, and that the merits had better be decided before an appeal to the United States Supreme Court.

The case of the "Garland," 20 Am. L. Reg., N. S., 742, and 5 Fed. Rep., 924 (1881—United States District Court Michigan), is one of the latest upon this subject. There were two libels in that case, the supplemental one setting up the libellant's appointment as administrator of the decedent's estate, and claiming to recover in that capacity under the statute of Michigan. The collision took place in the Detroit river. The court concedes that according to both the common and civil law no action would lie, and sustains the jurisdiction particularly upon the ground set up in the supplemental libel. Judge Brown did not agree with the decisions maintaining a libel upon principles of maritime law as being different from that of the common law on the subject.

See the very elaborate note to this case, stating (page 747) that neither the civil law nor any of the great maritime codes gave an action for a personal injury after the death of the person injured, and examining every case on the subject. The annotator says (page 750, A. L. R.): "This examination of the case seems to warrant the following statement of the law. The wrongful killing of a human being is a tort within the jurisdiction of the State governments. Statutes passed by them giving to the executor or administrator of the deceased a right of action

for such tort are applicable, when the killing takes place upon navigable waters within the territorial limits of the States respectively, on the principle that, as to matters within the jurisdiction of a State, its laws, unless superseded by Federal statutes follow and are in force upon vessels of the State upon the high seas. Such statutes also gives the executor or administrator a right of action when the killing takes place upon the high seas. The tort being maritime, the right of action will be enforced in a court of admiralty of the United States whenever the killing is upon a navigable water."

Another recent case is that of the "Sylvan Glen" (D. C. E. D. of N. Y., October, 1881), 9 Fed. Rep., 335, where it was held that the statutes of New York upon which the libel (for damages for death of a woman caused by a steamboat striking a rowboat in the East river) was based, did not create any *maritime lien* in such a case, and though it was conceded that the right created by the statutes could be enforced in the admiralty, it was denied that a proceeding *in rem* could be sustained, and the libel was dismissed.

Judge Benedict said: "The right of action set up in the libel *is derived from a statute of the State of New York*, which provides, &c. This statute creates a liability where none before existed. It makes a new cause of action, namely the death, and it declares who shall be liable to such action, and by whom, as well as for whose benefit, the action may be maintained. It is not doubted that the right created by this statute of the State may be enforced in a proper case by the courts of the United States, nor that it may be enforced in the admiralty when a marine tort is the foundation of the right. These propositions have not been controverted here, but they by no means afford ground on which to maintain this action, for this is an action *in rem*, and *if maintainable at all, must rest upon the proposition, that the libellant, by virtue of this statute of the State*, has a maritime lien upon the vessel proceeded against for the damage resulting to the husband and next of kin of Margaret Welsh, from the death of that person. No ground has been suggested upon which such a proposition can be maintained. The words of the statute create no lien, much less a maritime lien * * *

It is not seen, therefore, how in any aspect the statute upon which the libellant relies can afford a right of action against the vessel." And the court said that the "Highland Light" was against the libellant and the "Garland" was no authority, for the point did not appear to have received attention in that case.

The "Sylvan Glen" is a direct authority for the appellants here, for if the general maritime law gives a cause of action in a case of this kind, a maritime lien upon the vessel and the consequent process *in rem* would follow.

The next case is the "E. B. Ward, Jr.," 16 Fed. Rep., 255, and 17 *Id.*, 456; S. C., 4 Woods, 145. The collision and deaths in that case took place upon the high seas, and within the territory of no nation. The delinquent vessel the "E. B. Ward, Jr.," belonged to the port of New Orleans. The other was a Swedish vessel. A statute of Louisiana (Civil Code, Act 2314), provided for a survival to the next of kin of a decedent where death was caused by negligence of the right of action for damages suffered thereby. On exception to the libel Judge Billings delivered an opinion that the libel could not be sustained. He said, page 258 (16 Fed. R.): "But it may be stated that both in the common law and in the admiralty in the courts of the United States, except in cases affected by statutes, it has been uniformly held that the death of a person could not constitute a cause for a civil action;" and on page 261, "Until that is done (legislation by Congress), until the law-making or treaty-making power has created this right and affixed its limitations, courts cannot decree damages in actions by one person for the death of another upon the high seas."

Upon an appeal to the Circuit Court Pardee, J., reversed this ruling, but he did so because he felt bound by the weight of authority in the other circuit courts. He said, page 459: "At all events as the question is an open one it is best to resolve the doubts in favor of what all the judges concede to "natural equity and justice." But he places the decree upon another ground upon which it can be maintained; that the "E. B. Ward, Jr.," when on the Gulf of Mexico was part of the territory of Louisiana so far as legal rights and legal jurisdiction were concerned, and that the cause of action therefore existed by force of the territorial statute.

This principle of the application of a State statute to vessels at sea has been applied in the State courts.

See McDonald *vs.* Mallory, 77 New York, 546 (1879), where it was held that as to matters not committed by the Constitution exclusively to the Federal Government or legislated upon by Congress, but which are regulated entirely by State laws, a State to which a vessel belongs can be regarded as the sovereignty whose laws follow her until she comes within the jurisdiction of some other government, and that therefore under the statute of New York, giving a right of action for causing death by a wrongful act or neglect, an action was maintainable for causing the death of a citizen of New York on the high seas on board of a vessel hailing from and registered in a port within the State, the vessel being employed by the owners and their negligence having caused the death.

In Crapo *vs.* Kelly, 16 Wallace, 610, it was held that a ship registered in Massachusetts, on the high seas at the time of the application of the owner to the insolvent court of that State for the benefit of its insolvent laws, was a portion of the territory of Massachusetts, and that the assignment by the insolvent court of that State passed the title to the ship in the same manner and with like effect as if she had been physically within the bounds of that State when the assignment was executed.

And in Wilson *vs.* McNamee, 102 U. S., 572, a suit under the pilot laws of New York, where the services were tendered to and refused by the master of the vessel, when she was without the jurisdiction of the State, Judge Swayne affirming judgment for the pilotage, said, "A vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality."

The question of the jurisdiction in admiralty of a suit *in rem* under a State statute providing for recovery in case of death by negligence was considered as an original one at length by Hughes, J., in the case of the "Manhasset," 18 Fed. Rep., 918 (Jany., 1884). A libel was filed by the administratrix of a man who died from injuries on a ferry boat, as he was about landing at Norfolk. It was based upon the Statute of Virginia

authorizing suits for personal injuries caused by negligence to be brought, after the death of the person injured, by his personal representative. He concurs with Judge Benedict in the "Sylvan Glen," *supra*, that the State statute created no lien at all, and that there can be no proceeding founded upon it *in rem* in the admiralty. The learned judge indeed said that he thought the widow and children of the deceased might sue *in rem* both upon the authority of and independently of the decision in the "Sea Gull," as a maritime right, but the general authorities he cites do not bear out his statement.

In perhaps the latest case in which a libel has been filed in the admiralty in case of death arising from negligence upon navigable waters, that of Butler *vs.* The Boston and Savannah Steamship Company on appeal in the Circuit Court, District of Massachusetts, May Term, 1885, the libel was said to be exhibited in an action of tort and contract. It alleged a contract of carriage between the decedent and the steamship company, and negligence in the navigation of the vessel, and set out the Statutes of Mass., ch. 73, section 6, that if the life of a passenger is lost by reason of negligence of a common carrier such carrier shall be liable in damages not exceeding $5000 nor less than $500, to be recovered in an action of tort commenced within one year from the injury by the executor or administrator. The libellants claimed to recover under the general admiralty jurisprudence of the United States and by virtue of the said statute of Massachusetts. The ship having been lost the respondent as owner thereof took proceedings to claim and have the benefit of the limitation of liability provided in section 4283 of the Revised Statutes of the United States, for all losses whatever arising out of the stranding of the vessel, and this proceeding was pleaded to the libel, and the case went upon the question of the application of the act of Congress for the limitation of the liability of shipowners to the claims of the libellants, the latter alleging that it had no application thereto. The statement of agreed facts admitted that the disaster occurred within the limits of the State of Massachusetts, and that the respondent was a corporation organized under the laws of Massachusetts, located at Boston.

In this case the question of jurisdiction was not raised by the

respondents, who were anxious for a decision upon the question of the application of the limited liability act. I understand, however, that Mr. Justice Gray, who sat in the Circuit Court, regarded the question of jurisdiction as an open one. The brief of the libellants relied upon the statute of Massachusetts, *supra*, as one ground of recovery, and urged that the libel should be sustained upon that basis if it could not be under the general admiralty jurisdiction.

Certainly in England no such doctrine as that contended for upon the other side has been put forth. The endeavor there has been only to sustain the jurisdiction of the admiralty in a case coming within the terms of Lord Campbell's Act, 9 and 10 Vict., c. 93. This depended upon another statute prescribing the jurisdiction of the High Court of Admiralty; 24 Vict., c. 10.

It was held in Smith *vs.* Brown, L. R., 6 Q. B., 729, that the court of admiralty had no jurisdiction to entertain a suit under Lord Campbell's Act for personal injuries resulting in death occasioned by the collision of two vessels, and a prohibition to that court was issued.

The admiralty courts, however, had themselves held that they had jurisdiction in such cases, but it was not pretended upon any other ground than Lord Campbell's Act.

In the "Guldfaxe," L. R., 2 Adm., 324, where in a suit to recover damages by the personal representative of a person killed in a collision between two vessels, it was held, though not without doubt, that the court had jurisdiction under Lord Campbell's Act and the Admiralty Court Act of 1861 to entertain the suit, it was admitted by counsel for the plaintiffs that before the passing of Lord Campbell's Act no action would have lain for the death of a seaman, and Sir Robert Phillimore so considered the question.

In the "Explorer," L. R., 3 Adm., 289, it was held that the provisions of Lord Campbell's Act extended to a case where the person, in respect to whose death damages were sought to be recovered, was an alien, and was at the time of the wrongful act, neglect, or default which caused his death, on board a foreign vessel on the high seas.

And the "Franconia," L. R., 2 Prob. Div., 163 and 170,

was an action instituted against a foreign ship to recover damages for the death of the husband of the plaintiff, alleged to have been caused by a collision brought about by improper navigation. The jurisdiction was sustained in the court of appeal. *It was agreed that the right of action was under Lord Campbell's Act.* The question was whether it could be enforced in the admiralty under another statute.

The judges in favor of the affirmance of the jurisdiction said: (page 172): "It is admitted that if the Court of Admiralty had any such jurisdiction, it was conferred upon it by the Admiralty Jurisdiction Act."

The last case in England is the "Vera Cruz," 9 L. R., Prob. Div. 96 (1884), in the court of appeal, in which it was held dissenting from the "Franconia" that an action *in rem* against a foreign ship under Lord Campbell's Act is not within the Admiralty Act, 1861, 24 Vict., c. 10, s. 7, and therefore that the admiralty division had not jurisdiction over such an action. The collision took place within the three mile limit (at the mouth of the Mersey) and therefore within the municipal jurisdiction of the country. The owner was resident abroad and the proceeding was *in rem*. Brett, M. R., said (page 98): "The main point, however, in this case, depends on this, that unless jurisdiction is given by the seventh section of the Admiralty Court Act, 1831, the Court of Admiralty has no jurisdiction * * Whether that section applies to the grievance, for which a remedy was given by Lord Campbell's Act depends on the construction of these two Acts. * * What then is the cause of action given by Lord Campbell's Act. That statute was passed to meet cases of injury caused to a man's person, because by law his right of action died with him. But Lord Campbell's Act gave to a person who had no right before, a right of action as representative of other persons who had also no right before, the executor who may sue being a mere instrument who acts on behalf of such persons."

The court came to the conclusion that the action was not within the jurisdiction of the court by reason of the deficiency of the words of the Admiralty Act.

This decision has lately (December, 1884) been affirmed in

the House of Lords, see Mary Seward *vs.* Vera Cruz, 10 L. R. Appeal Cases, 59.

The Lord Chancellor Selborne said, "The question whether such an action lies or not, depends altogether upon the construction and effect of the seventh and thirty-fifth sections of the Admiralty Court Act of 1861.

He continued, page 66: "It must be remembered that Lord Campbell's Act is the source of the right, if the right exists, and we must look to that act. * * * Inasmuch as there can be no right of action whatever, unless it comes within the terms of Lord Campbell's Act, let us see," &c. * * * And on page 67: "Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim '*Actio personalis moritur cum persona,*'" because the action is given in substance not to the person representing in point of estate, the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children."

See also Lord Blackburn's opinion, page 70, citing Pym *vs.* Great Northern Railway Company, 2 B. & S., 759, and 4 B. & S., 396, as to the character of the action under Lord Campbell's Act.

The whole question therefore considered in England was that of the jurisdiction of the admiralty under statute, and even under that the jurisdiction has been now finally denied.

As before stated, there is no doubt here under our cases, of the jurisdiction of the admiralty to enforce *in personam* the State statute right of recovery. It must, however, in such case, do so according to the limitations of the right therein provided. The action must be brought by the parties entitled within the time limit, and it seems not by a proceeding *in rem.*

Just as in the case of the "Edith," 94 U. S., 518, where it was held that a creditor claiming the benefit of the provisions of the statute of New York, of April 24th, 1862, purporting to give a lien upon a vessel for materials furnished and work done in repairing her at her home port, must, whether such lien be good or bad, which the court did not determine, take it subject to all the conditions which the statute imposes, and he loses it if

it be not enforced within the time prescribed in the statute. The State statute in that case provided that the lien should cease at the expiration of six months after the debt was contracted, unless, &c. The ship was not libeled within the limited time.

So much for the American and English authorities upon the subject, every one of which counsel believe is cited and considered above.

A *résumé* shows that of the United States admiralty decisions, "The Highland Light," Holmes *vs.* Railway Co., "The Clatsop Chief," *Re* Long Island Trans. Co., and the "Garland," all are put expressly upon the ground of the respective State statute, which was held applicable in the particular case. The same ground existed in "The Towanda," though not adverted to. It also existed in "The E. B. Ward, Jr.," and was put as a reason for the judgment. In two of the other cases, Cutting *vs.* Seabury, and "The Charles Morgan," the question is left undecided. "The Sea Gull," by which the court in the "D. Reeves" considered itself bound, is the only case purporting to be expressly in the libellant's favor, and three, "The Sylvan Glen," "Armstrong and Beadle," and "The Manhasset," are against them.

But is there, aside from these cases, none of which are precedents here, any reason for the adoption of a different rule in the admiralty from that prescribed by the statute law of the State which may be applied?

Suppose the old common-law rule to be conceded to have been unreasonable, no argument can now be drawn therefrom. It has been changed in almost every State in the country, and the statutes of the various States can be applied in the admiralty in almost every cause of collision upon navigable waters, either by virtue of the locality of the tort or of the sovereignty of the offending vessel. There is therefore no call for the announcement of a rule in the admiralty which would permit a recovery in a case which confessedly could not be maintained under the State law governing the same cause of action. But whether reasonable or not is aside from the matter. Congress can legislate upon the matter and change the law if it will, but in the absence of such an act, the law should be declared as it is.

The argument, however, which is usually made upon the other side is that the general maritime law is based upon the civil law, and that by the latter there was an action by survivors damaged by the death of one through negligence. But this is not an accurate statement of the civil law.

The annotator to "The Garland," 20 Am. L. Reg., N. S., 747, says, in an elaborate examination of the question, "It is true, that by the civil law (*lex Aquilia*) an action for damages was given for killing human beings, but they were slaves who were classed with cattle, for the wrongful killing of which the same law gave the same action. Sandars Justinian, 502. The life of a free man was considered inappreciable in coin. An action was also given by the civil law for personal torts to freemen, but the action was personal to the person injured, and could not be transmitted to his heirs, unless before his death the action had already proceeded so far as the *litis contestatio*. Sandars Justinian, 514."

And in Louisiana, Hubgh *vs.* New Orleans, &c., R. Co., 6 La. Ann., 498, 508, it is held that an action for damages caused by tortiously killing a free human being cannot be maintained; and the court concluded that it is a general principle of the Roman law that actions for personal injuries are strictly personal. 24 Pothier's Pandectes, 279, Law 13, is cited to sustain this conclusion.

Nor do any of the great maritime codes—the laws of Oleron, of Wisbury, of the Hanse Towns, or the Marine Ordinance of Louis—give an action for a personal injury after the death of the person injured. And it seems to be the understanding of leading text writers on maritime law that such actions do not survive the death of the person injured. See Benedict's Admr., 2d Ed., section 309; 2 Parsons' Admr., 350-351; Hall's Admr. Prac., 22; Dunlap's Admr. Prac., 87.

The authorities cited by Judge Hughes in The Manhasset, *supra*, that a right of action in case of death upon the sea by negligence is a maritime right conferred by the general law maritime, do not bear out his statement.

There is another Louisiana case, Herman *vs.* N. O. & C. R. R. Co., 11 La. Ann., 5, in which, as well as in Hubgh *vs.* Same,

all the authorities bearing upon the point are collected and most elaborately and learnedly considered. Their conclusion is that an action for damages caused by the homicide of a free human being could not be maintained in Louisiana.

Hubgh's case was argued twice, the second time upon a most exhaustive brief for the plaintiffs.

The plaintiff was a locomotive engineer in the defendant's employ, and was instantly killed by the explosion of the boiler. The action was brought by the widow for herself and children. The defendant filed an exception that the petition set forth no cause of action, and the case presented, as Rost, J., said, "the question whether the death of a human being can be the ground of an action for damages."

He continued, page 496: "It is urged that under the civil law, the present action can be maintained. But the plaintiff's counsel have not favored us with any authority from the Roman or Spanish law, sustaining the position they assume. On the contrary, it is a general rule under those systems that actions for personal injuries are strictly personal. 24 Pothier's Pandectes, page 279, Law 13; 7 Partida, tit. 15, 1, 3."

See the argument upon the rehearing, *id.* page 498, and opinion delivered thereon by Chief Justice Eustis, *id.* page 508. That judge, prefacing his opinion by the statement that the impression that dependants on the daily labor of one who has been killed through the negligence of others, ought to be indemnified, results from a sense of justice which all right-minded men must acknowledge, goes on at once to show that the most approved writers on natural law, formally recognizing the obligation as a duty, put it on a ground which excludes all idea of its forming a part of the civil law, or being the basis of an action. He goes on page 510, to show that Article 1382 of the Code Napoleon is not applicable, and states: "We found no precedent for any such action, though unfortunately, occasions for its exercise have been but too frequent within our borders, and with the learning and research which has distinguished our bar for nearly half a century, the singular fact remains unexplained, that up to the present suit no such right of action has been asserted."

The learned judge goes on to consider the Roman and Span-

ish law, saying as to the former, "That as a general principle no such rule (that the death of a free person can be the ground of an action for damages) prevailed under the Roman law, we think may be affirmed. If it existed, it has escaped the research of Gibbon and Mackelday, and the diligence of counsel has referred us to no text or commentator which authorizes the opinion that the action was allowed." And as to the latter, "We can find nothing in the laws of Spain which authorizes this action or which presupposes any such right of action to exist, and are satisfied that as a general rule under both systems, actions for injuries to the person are strictly personal, and that there is no recognized principle in either, on which the plaintiff's action can be maintained."

Finally he goes on to consider Article 2294 of the Code of Louisiana, and comes to the conclusion that it did not sustain the action. He concludes, page 514: "It will rest with the legislative power alone, to provide the remedy sought, if public policy requires its introduction."

In Herman's case the subject was gone over again, the arguments of counsel being very extended and elaborate, but the court refused to change its former decision.

The argument for the plaintiff by the same counsel as in Hubghs' case, and which went over the entire field again, asserted that Judge Eustis's quotation of Grotius was erroneous, and elaborated this point with great research and detail. It was a direct and pointed attack on the former opinion of the court, and it may be certainly said that there exists nothing in the way of precedent or authority that was not called to the attention of the court.

Both these cases are cited by Justice Hunt in Ins. Co. *vs.* Brame, 5 Otto, 757.

It is not conclusive, however, to say that the admiralty law of the United States follows the civil law, and that therefore this libel is maintainable, supposing it were so, under the latter.

The Supreme Court said in *Ex parte* Easton, 5 Otto, 70:— "In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On that subject three proposi-

tions may be assumed as settled by authority, and to those it will be sufficient to refer on the present occasion, without much discussion of the principles on which the adjudications rest:—

"1. That the jurisdiction of the district courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when our Constitution was adopted.

"2. That the jurisdiction of those courts does not extend to all cases which would fall within such jurisdiction, according to the civil law and the practice and usages of Continental Europe.

"3. That the nature and extent of the admiralty jurisdiction conferred by the Constitution must be determined by the laws of Congress and the decisions of this court, and by the usages prevailing in the courts of the States at the time the Federal Constitution was adopted. No other rules are known which it is reasonable to suppose could have been in the minds of the framers of the Constitution than those which were then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the State courts."

And in "The Lottawanna," 21 Wall., 558, it was held that whilst the general maritime law is the basis of the maritime law of the United States, it is only so far operative in this, as it is adopted by the laws and usages thereof. It has no inherent force of its own. The general system of maritime law which was familar to the lawyers and statesmen of the country when the Constitution was adopted, was intended and referred to, when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." Thus adopted it became the maritime law of the United States, operating uniformly in the whole country.

It is therefore submitted by respondents that there is neither authority nor sound reason for the assertion that this libel is maintainable by the maritime law of the United States, and that whatever right of action arose to the libellants in consequence of the death of S. E. Rickards in the collision between "The Marietta Tilton" and "The Harrisburg," is referable only to the statute law either of Massachusetts or Pennsylvania; that no proceeding in the admiralty *in rem* can be maintained thereunder; and that

in any proceeding in the admiralty the limitation which is the same in both statutes one year from the death, must apply and absolutely bar a recovery by the libellant.

II. But should such a jurisdiction in the admiralty be maintained, it should follow by analogy the time of limitation fixed in the State statutes.

There can be no doubt that in this case the courts of Pennsylvania would have had concurrent jurisdiction, either upon the ground of sovereignty over the vessel as in McDonald *vs.* Mallory, under the Pennsylvania statute, or of the locality if the statute of Massachusetts applied.

See the recent case of Knight *vs.* West Jersey R. R. Co. (Supt. Ct. Pa.), Legal Int., 1885, page 352, following Dennick *vs.* Railroad Company, *supra*, that suit may be brought in the courts of Pennsylvania against a railroad company for alleged negligence in the killing of a person in the State of New Jersey, under a statute of that State similar to that of Pennsylvania.

Now no suit for the cause of action in this case could be maintained in a Pennsylvania court after the lapse of a year, and it would seem that the limitation provided in the State statute should be followed in the concurrent jurisdiction.

Though a State statute of limitation is not strictly a bar in the admiralty it should, it is submitted, be followed in this court in a case of this kind by analogy. There is no reason why it should not. The appellants' vessel and the claimants themselves have been at all times within the jurisdiction of the court.

The rule is that a State statute of limitation is followed by analogy in admiralty, as in equity, where no special equitable reasons exist against its application.

3 Mason, 95, Willard *vs.* Dorr;
2 Sumner, 206, 212, The Sarah Ann;
Blatch. & H., 269, Saunders *vs.* Buckup;
18 Fed. Rep., 547, Scull *vs.* Raymond.

The Key City, 14 Wall., 653, is not at variance with this contention. It was a proceeding exclusively of admiralty jurisdiction, and its principles are confined to such a case. It may be that in a matter solely within the cognizance of courts of ad-

miralty, they will as well as courts of equity not inflexibly adhere to the common-law period of limitation, but it would be a strange result to reach to hold that there could be a recovery in the admiralty in a case like this, where the same plaintiff would be turned out of State courts having concurrent jurisdiction.

See Reed *vs.* Ins. Co., 95 U. S., 23.

Where the State and Federal courts have concurrent jurisdiction, a State statute of limitation may be pleaded as effectively in a Federal court as it could be in a State court.

Price *vs.* Yates, 19 Alb. Law J., 294 (C. C. U. S., West. Dist., Pa., 1879).

THOMAS HART, JR.

FEBRUARY, 1886.

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No. 217. *October Term, 1885.*

Supreme Court of the United States.

The Steamer "Harrisburg," Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, Receivers of The Philadelphia and Reading Railroad Company, owners of said Steamer, Appellants,

vs.

Emma S. Rickards and Mary C. Rickards, by her next friend Emma S. Rickards, widow and daughter of Silas E. Rickards, late first officer of the Schooner "Marietta Tilton."

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

REPLY TO BRIEF OF APPELLEES.

THOMAS HART, JR.

Allen, Lane & Scott, Printers, Nos. 229 and 231 South Fifth Street, Philadelphia.

In the Supreme Court of the United States.

The Steamer "Harrisburg" et al., *Appellants,*	
vs.	No. 217, October Term,
Emma S. Rickards and Mary C. Rickards by her next friend, widow and daughter of Silas E. Rickards, Appellees.	1885.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

REPLY TO BRIEF OF APPELLEES.

Some portions of the appellees' brief call for a reply, the heads of which will follow the numeral subdivisions of the former, to which they apply.

III. The "Plymouth," 3 Wall., 20, was a case of damage done wholly upon land, the cause thereof having originated on navigable water. The admiralty jurisdiction was denied. The question considered was that of jurisdiction as depending upon locality only; the character of the tort was not in doubt. The language for which alone the case is quoted (page 36) is used in connection with the idea of locality, as conferring admiralty jurisdiction. It did not to mean to affirm, that an act for which there could be no action if committed on land, became the subject of recovery because committed on the water.

XV. The best reply to the citation from Grotius is the following extract from Judge Eustis's opinion in Hubgh's Case, 6 La. Ann., 509: "But the ground on which Grotius, with whom the idea (of recognizing as a duty the obligation of aiding those whom one's act had reduced to want or deprived of their daily support) originates, places it, excludes all idea of its forming a part of the civil law or being the basis of an action. Speaking of the indemnity to be made in cases of injury, he goes on to state some examples of what the indemnity, which the party committing the wrong is bound to make, consists. A man who has unjustly killed another ought to pay the expenses incurred for his physicians, and give to those whom the deceased was bound to support, as his father and mother, his women and his children, the amount of their maintenance, according to the age of the deceased. Thus Hercules, having slain Iphytus, paid a fine to his children, in order to secure more easily an expiation of his crime. A commentator of Aristotle says, that what one gives to the wife, the children and other dependants of the person slain, is *given in some sort.* 'When I speak of homicide, I mean an unjust homicide, that is, one committed by a person who had no right to do the act from which the death has ensued. If one has the right to endanger the life of another, however one may have sinned against charity, as in case of not taking to flight, he is not responsible for the death, so far as relates to the indemnity of which we are now treating. Besides, a price may be put upon the life of a slave who can be sold, but the life of a free person is not susceptible of valuation.' The author refers, in a note to the title in *lib.* 9 of the Digest, which is the title *De his qui offenderint,* which, in case of a free man's having been injured by an object thrown into the street, provides, '*Cicatricem cautem aut deformitatis nulla sit æstimatio, quia liberum corpus nullum recipit æstimationem:* There is no estimate made of the scars or deformity produced, because the value of the body of a free man cannot be estimated in money.'

"This author did not profess to treat of jurisprudence, but he declared the principles of natural law and the laws of nations, from the writings of the philosophers, poets, historians and orators of antiquity. He does not confound one with the other,

and distinguishes both from the civil or municipal law. He, it will be observed, is obliged to consider this indemnity rather as a matter of gift or liberality; an affair of conscience rather than an obligation of strict duty."

Whether Judge Eustis's translation be strictly accurate or not is unimportant. It was assailed by the learned counsel in Hermann's Case only so far as Grotius was quoted as saying that the indemnity was a gift or liberality. Whether he did so consider it or as an imperfect or natural obligation, has little bearing. The learned judge conceded the obligation to be a duty, in the sense that it was one of natural law; but, as he said, that was not sufficient to make it the foundation of an action.

That Grotius distinguished between the life of a slave and of a free man is seen from Rutherford, who says in the section quoted by the appellees: "Grotius here distinguishes between the murder of a free man and the murder of a slave."

The language in Domat's Civil Law, book II., title 8, section 1, article 4 (Strahan's translation, 1861, 2d Vol., page 605), is: "If that which has been thrown out of a house causes the death of any person or wounds him, the person who did it will be tried for it in a criminal prosecution. And he shall be punished according to the nature of the act, and will be liable to make good the damage that is done. And the master of the house will likewise be liable to a fine and to such damages or other penalty as he may appear to deserve according to the circumstances."

The damage which is spoken of is not damage to other persons who may suffer some loss by the death of the person injured, but as the preceding sections show, damage to the person or property of the one injured.

Bell, section 2029, "Principles of the Law of Scotland," is speaking of "Reparation or assythment for homicide;" and Erskine, quoted by Judge Hughes in the "Manhasset," Insts., book IV., title 4, section 105, is speaking of "crimes and their extinguishment by pardon or remission."

Bell says in the section alluded to: "Capital punishment with forfeiture of movable goods is a satisfaction at once of public justice and private vengeance, and no assythment is due."

From the quotations in Erskine it appears that there are old Scottish acts of Parliament upon this subject. The authorities cited by Bell and Erskine which have been examined, do not suggest the origin of the main doctrine of the text.

XVI. All the United States admiralty cases cited by the learned counsel as authorities for his position have already been considered. The following particular observations may be added:—

The "Sea Gull." The quotation from the opinion of the late Chief Justice of this court shows clearly how he was led into error. A father recovers in case he be deprived of the services of his minor son, because he has a legal right to his wages. See Plummer *vs.* Webb, 4 Mason, 380, which went wholly upon the contract between the libellant and the respondent for the service of the minor. The father never recovered after the majority of his child. And yet this principle, which is so different from that now advanced, which latter must include any one, without being limited to certain relationship or age, provided there is some pecuniary interest in the life of the deceased, seems to have been that governing the mind of the Chief Justice.

It may be that the proceedings in the "Towanda" did not expressly say anything about the statute of Pennsylvania. But the statute did govern the case and support the recovery, for the libel was filed within the year. The judgment was right, though not for the reasons given. Beyond this, the case is worth just as much as the reasoning of the learned court is worth. How far it is founded on authority has already been considered.

XVIII. The "E. B. Warde, Jr." It is difficult to understand how the learned counsel can rely upon this case. The District Court, Judge Billings, held that the libel could not be sustained, and while the United States Circuit Court reversed this judgment, Judge Pardee put the decree upon the same ground which existed in the "Towanda," that there was a statute governing the offending vessel. As far as general principles were concerned, he felt bound by the expression of opinion by other circuit court judges.

It would be a very strange thing to hold, however, that because one circuit court has started off in a certain line of reasoning and made a decision which has from comity and courtesy been followed by other circuit courts, but from the decrees in which courts no appeal has been taken to this court because the amount in controversy has not reached the statutory sum, that these decisions should be taken as settling the law here. The very question is whether the Circuit Court in this case was right or not, and it is no matter how many circuit courts have done the same thing, supposing such to be the fact. The endeavor of the appellants in the former brief has been to show that in point of fact these circuit court decisions do not stand in the way of a reversal here. They were almost entirely correctly decided, in consequence of the existence therein of the State statute law element.

XIX. The "D. Reeves" and "The Charles Morgan." The first named case was in the United States District Court. Judge Morris simply said he felt bound by the cases in his own circuit. It is to be inferred from his opinion that he did not however approve of the doctrine he felt bound to follow.

The other case was also in the District Court. Judge Swing conceded the uncertainty of the question, and contemplated a settlement thereof by this court only.

XX. The cases in the admiralty arising under State statutes which the appellees do not consider affecting the question here show that whenever there was a State statute and whenever the libel could be brought thereunder it was invariably so founded.

The English cases show in the most pointed manner how entirely the whole question was considered there as one exclusively of statute origin.

In the last case, the "Vera Cruz," pages 22 and 23 former brief, the question argued and decided was whether the seventh section of the Admiralty Court Act that "The High Court of Admiralty shall have jurisdiction over any claim for damage *done by a ship*," could according to sound principles of construction

be held to include such causes of action as arise under Lord Campbell's Act, when death shall be caused "by the wrongful act, neglect or default" of some other person.

The Lord Chancellor said: "We must look to that act (Lord Campbell's) to see whether a claim made under that act can naturally or properly be described as a 'claim for damage done by a ship.' The first observation which occurs is this—there is not a word about ships in Lord Campbell's Act. And the court concludes as before stated that there is no jurisdiction in the admiralty in cases under Lord Campbell's Act."

XXI. The "Sylvan Glen." Just what the "Sylvan Glen" decided is accurately stated upon page 17 of former brief. Judge Benedict certainly did decide that there could be no such thing as a libel *in rem* under the New York Statute. Just how much reason there is for the assumption made by the learned counsel "that if the libel had invoked the law and jurisdiction of the admiralty alone, the well-known learning and experience of Judge Benedict would undoubtedly have assured a different result," will be seen by reference to his opinion, in which he says: "*This statute (that of New York) creates a liability where none before existed. It makes a new cause of action, namely the death, &c.*"

If Judge Benedict had thought for a moment that there was any jurisdiction in the admiralty independently of the statute, he could not have failed to have gone on and given some indication of his opinion that the libel might be sustained thereunder.

XXII. The "Manhasset" was a case of exactly the same kind. Judge Hughes did suggest, as stated in the former brief, page 20, that the libel *in rem* might be sustained under the general maritime law, but this is nothing but the statement of the learned judge, whose citations do not bear him out. The authorities he refers to are:—

Domat Civil Law, Bk. 2, tit. 8, section 1, art. 4;
Grotius, Book 2, chapter 17, section 13;
Rutherford's Institutes;
Bell's Prin. Scot. Laws, page 748, section 2029;
Ersk. Inst. Bk. 4, tit. 4, section 106.

These are the same depended on by the appellees here. See XV. pages 8 and 9 of their paper-book, and which have already been answered herein.

XXIII. The two Louisiana cases are most important. They decided that the actions there brought could not be sustained under the Louisiana Civil Code, as it then existed, but in the search for a sound interpretation of this provision, which was thought to give the action, the whole doctrine of the civil law was gone into. It has always been pretended that the civil law was the fountain from which the doctrine contended for upon the other side flowed. If no authoritative recognition of it can be found in the civil law, where does it come from? If there is nothing in Partida or Pothier about it, where can it be found? The "parade of authorities" was upon this very important point; and, as was said before, there is nothing upon the subject which was not upon one side or the other pressed upon the court.

That the law has been changed now in Louisiana, is nothing more than that the common law has been changed in Pennsylvania and Massachusetts. The United States has not yet legislated upon the subject, and until Congress does so the admiralty will act only under and in accordance with the territorial law.

XXIV. The early American text writers quoted in the former brief show the received doctrine upon the subject, and they are supported by Mr. Henry, the latest writer. See page 6, former brief.

XXV. The statutes upon this subject have all found it necessary to provide just who are entitled and in what proportions. They meant very carefully to give a new right, which was defined and limited. But just as soon as one leaves the statute regulation and talks of "natural equity" and the "duty" to maintain wife and children, difficulty is encountered. How and why is it that wife and children are entitled? Why is it that parents are not entitled? Are they entitled if there be no wife and children? Suppose the decedent have creditors—can they

recover? No interest, in the sense that we use that term, a legal interest, a pecuniary interest, can exceed that of a creditor, and the duty to pay him is quite equal in law to that to support a family. Of course the learned counsel does not mean to suggest that a creditor could maintain a libel in the admiralty upon the general maritime law; but if the wife and children can, why can he not?

THOMAS HART, JR.

March, 1886.

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No. 217. October Term, 1885.

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Supreme Court of the United States.

The Steamer "Harrisburg" *et al.*,
Appellants,

vs.

Emma J. Rickards and Mary C. Rickards, by her next friend Emma J. Rickards, widow and daughter of Silas E. Rickards,
Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief of Appellees.

HENRY FLANDERS,
Proctor for Appellees.

A5

The Steamer "HARRISBURG" *et al.*, *Appellants*,
vs.
EMMA J. RICKARDS and MARY C. RICKARDS, by her next friend EMMA J. RICKARDS, widow and daughter of SILAS E. RICKARDS, *Appellees.*

Supreme Court of the United States.

October Term, 1885.
No. 217.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

I.—FINDINGS OF FACT.

(*a.*) "*That the place where the said collision and the drowning of the said Rickards occurred was about one hundred yards from Cross Rip lightship, which lies in a sound of the sea called Nantucket Sound, embraced between the coast of Massachusetts and the islands of Martha's Vineyard and Nantucket, parts of the said State of Massachusetts.*"

(*b.*) "*That the said steamer 'Harrisburg' was at the time of the said collision engaged in the coasting trade and belonged to the port of Philadelphia, in the Commonwealth of Pennsylvania, at which place she was then duly enrolled according to the Act of Congress in such case made and provided.*"

(*c.*) "*No innocent rights to or in the said steamer have arisen between the date of said collision and the exhibition of the libel.*"

II. CONCLUSIONS OF LAW.

(*d.*) "*By the statute law of the Commonwealth of Massachusetts, Statutes of* 1860, *chapter* 63, *sections* 98 *and* 99, *it is provided, in cases of death arising from negligence, that a fine may be recovered by indictment and paid to the executor or administrator, and that such indictment shall be prosecuted within one year from the injuries causing the death.*"

(*e.*) "*By the statute law of Pennsylvania, Acts of April* 15, 1851, *and April* 26, 1855, *it is provided that the action therein given, in cases of death occasioned by negligence, shall be brought within one year after the death and not thereafter.*"

(*f.*) "*In the Admiralty Courts of the United States the death of a human being upon the high seas or waters navigable from the sea, caused by negligence, may be complained of as an injury, and the wrong redressed under the general maritime law.*"

(*g.*) "*The right of the libellants does not depend upon the statute law of either the States of Massachusetts or Pennsylvania, and the limitation of one year in the statutes of these States does not bar this proceeding.*"

(*h*) "*Although an action in the State Courts of either Massachusetts or Pennsylvania would be barred by the limitation expressed in the statutes of those States, the admiralty is not bound thereby, and in this case will not follow the period of limitation therein provided and prescribed. The drowning complained of was caused by the improper navigation, negligence, and fault of the said steamer producing the collision aforesaid, and the libellants are entitled to recover.*"

(*i*) "*As there are no innocent rights to be affected by the present proceedings, and no inconvenience will result to the respondents from the delay attending it, the action, if not governed by the statutes aforesaid, is not barred by the libellants laches.*"

WILLIAM McKENNAN,
Circuit Judge.

BRIEF FOR APPELLEES.

I. By the Constitution of the United States (Art. 3, Sec. 2), the judicial power vested in the federal government extends "to all cases of admiralty and maritime jurisdiction."

II. In the distribution of this power "all civil causes of admiralty and maritime jurisdiction" are vested and are cognizable in the District Courts of the United States. *Revised Statutes, Sec.* 563.

III. In the exercise of this jurisdiction, "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth*, 3 *Wallace*, 20, 36.

IV. The steamship "Harrisburg," by whose tortious act the loss complained of in this cause occurred, was peculiarly subject to that jurisdiction. She was licensed and enrolled under the laws of the United States; her home port was a port of the United States; she cleared for the voyage in question under the authority of the United States; sailed under the flag of the United States; and was documented in pursuance of the laws of the United States.

V. The loss of life for which redress is sought in this proceeding, was by a tort done or committed by that vessel on the high seas, at or near a light-ship established and maintained by the United States, and at a point eight to fourteen miles from the nearest shore; a proceeding directly within the admiralty and maritime jurisdiction of the courts of the United States.

VI. It is not claimed, of course, that this jurisdiction ousts the law of the State within whose limits is the home

port of the vessel, so far as such law relates to its taxation as property, or as to its title and ownership as property, or as to its transfer and descent as property. That law determines the question of title, and if such vessel is on the high seas, an assignment or sale in accordance with the law of the State would pass the title to her.

VII. But this is not a question of title, but of tort, and it may well be doubted whether a State statute giving a right of action to the widow and children for the death of the husband and father by the wrongful act of another is applicable to a case arising on the high seas. It is submitted that in such a case the wrongful act was done within the sovereignty and jurisdiction of the United States, and not within the sovereignty and jurisdiction of the State within whose territorial limits was the home-part of the vessel. And it was so expressly held, in *Armstrong* vs. *Beadle*, 5 *Sawyer*, 484. It is true that in *McDonald vs. Mallory*, (*a*) 77 *New York*, 546, the Court proceeding upon a different theory, held that when acts done at sea *become the subject of adjudication here*" (that is, in New York), "the rights and liabilities of parties may in some cases be determined with reference" to the State statute.

VIII. But, however, this question may be determined by the State tribunals, in this cause, the libellants have not based their claim upon the statute of any State, nor sought redress for the loss they have sustained by virtue of any

(*a*) "The pleader, in *McDonald* vs. *Mallory*, evidently had in his mind a *transitory* action, and laid the *venue* thus: That 'said negligence and death occurred within the territory of the State of New York, to wit, at the city of New York, and on board said steamer belonging to the State of New York, and being first at the city of New York and thereafter on the high seas, as above stated.'

The Court, however, put its decision on other grounds.

such statute. They have invoked the protection and aid of the law and jurisdiction of the admiralty alone. If the equitable principles, in accordance with natural justice, which are administered by courts of that jurisdiction, are inadequate or inapplicable to their cause, then they are without remedy.

IX. They maintain, (1) that a marine tort is within the jurisdiction of the admiralty; and (2) that one who has suffered a loss by such tort is entitled to compensation. The appellants do not controvert these principles, but they insist that if the tort is so serious that death ensues, the widow and children of the decedent have no cause of action. Why? They say that the widow and children have no *property* in the husband and father. But the maritime law deals with realities and not with figments. The husband and father owes a *duty* to his wife and children. They are dependent on him for food and clothing and shelter. On what principle of natural justice should the *tort-feasor*, who has caused his death, and thus prevented the performance of this duty, be relieved of liability for the loss that has left them in absolute want? The wife has an insurable interest in the life of her husband, and so has his child. Both have a direct pecuniary interest in that life. If it has been destroyed by the wrongful act of another, on what doctrine of admiralty law, and general jurisprudence, should compensation be withheld? For the loss of a vessel or a cargo, by a marine tort, compensation is awarded, and was awarded in the instance of this collision. If in the one case why not in the other?

X. The answer is, that the common law determines otherwise! But the common law rule grew out of the feudal system, and is also founded on the notion that the private wrong is merged in the public offence. Nevertheless, the law of England did not wholly deny redress to the

widow and heirs for the killing of the husband and father. It allowed "an appeal of murder," and this appeal was not abolished until 1818; 59 *Geo. III.*, *chap.* 46, *sec.* 1. By that "appeal" pecuniary satisfaction "like the barbaric *weregild*" might be obtained. *Wilson's Modern English Law*, *pp.* 112, 166. But pray what has the common law to do with this question? This Court, in administering its admiralty and maritime jurisdiction, is not bound to follow the narrow and technical rules of that law, and it may be confidently asserted, has never done so. Yet in this case it is asked to apply a rule of decision so manifestly unjust that it has been repudiated by well-nigh all civilized States, and give to this repudiated and discredited rule the sanction and support of its own great and overshadowing authority! or else to subordinate its own proper jurisprudence to the statutes of the several States, and confine its remedial power to enforcing those statutes! It is respectfully submitted, that *Ex parte Gordon*, 14 *Otto*, 515, was a direct intimation to the common law bar, that as the common law rule had been rejected by nearly all enlightened states, it would likewise be rejected by this Court, whenever the opportunity occurred.

XI. The leading common law case is *Baker* vs. *Boardman*, 1 *Campb.*, 493. Lord *Ellenborough* held in that case, which was decided in 1808, that the husband could not recover for the loss of his wife, who died about a month after her injuries. The reporter, John Campbell, who afterwards became Lord Chief Justice Campbell, appended this significant note to the case, a note that found an answer in the Act 9 & 10 *Vict.*, *c.* 93, which bore his name: "If the wife be killed on the spot, is this to be considered *damnum absque injuria*?"

XII. About the same time, the same question was before the Scottish Courts, in the case of *Brown* vs. *McGregor*, 17 *Fac. Decis.*, 232, where an action was instituted by the widow

and children of Alexander Brown, "perfumer and hairdresser in Edinburgh," who was killed "while travelling to Glasgow on the top of the Mercury long-coach," which was overturned by a post-chaise, while both vehicles were driving with unusual speed.

The Lord Ordinary (*Meadowbank*) found the proprietors of the long-coach and chaise, conjunctly and severally, liable to the widow for £200 in assythment (that is indemnification), for slaughter of her husband, and in £130 to each of the children.

XIII. An appeal or "reclaiming petition" was taken to the Court of Session, a Court proceeding according to the principles of the civil law, and it was there argued that damages were not recoverable at all; but that, if this were not so, "from Mr. Brown's exertions in business having ceased to be serviceable to his family, the *quantum* of damages should be diminished."

Their lordships, "on advising the petition," entertained no doubt as to the law of the case. They were clearly and unanimously of opinion, that when damage was sustained by the unskilfulness, malversation, or culpable negligence of servants, in matters entrusted to their care, the masters are liable." Lord Justice Clerk (*Boyle*):—"The principle on which their lordships proceeded, had been solemnly recognized in the case of *Black* vs. *Cadell* (February 9, 1804), where it was offered to be proved, that the death of the sufferer, instead of being a loss to his family, might be regarded as a benefit, on account of his bankruptcy and dissipated habits. But the Court seemed little disposed to listen to any such plea, and awarded £800 of damages."

XIV. In *Paterson* (widow and children), vs. *Wallace & Co.*, 1 *Mac Queen; House of Lords' Cases* (*Scotch Appeals*), it was not controverted that recovery could be had, for the loss sustained by the death of the husband and father.

XV. And the great writers on the general principles of natural and civil law, writers of international fame, are in accord with the doctrine of the foregoing cases.

(*a*) *Grotius* says: "He that kills a man unjustly is bound to physicians and surgeons, if any be made use of, and to make such reparation to those whom the deceased person was obliged *in duty* to maintain, such as parents, wife, and children, as the hope of that maintenance (regard being had to the age of the deceased) amounts to." *Book* 2, *Ch.*, 17.

(*b*) *Rutherford*, in his "Institutes on Natural Law," in remarking upon the supposed distinction between the life of a freeman and a slave says: "If we observe that the life of the slave can no otherwise be looked upon as the master's property, than as he had an interest in it, we shall find that there is no reason for this distinction, since as far as the relations of a free man had an interest in his life, the person who murdered him is obliged to make them reparation. So that in either case, in settling the damages, *the life of the deceased is estimated according to the interest which those who survive him might have in it.*"

Book 1, *Ch.*, 17 *S.* 9.

(*c*) *Domat*, in his work on the Civil Law, says: "If that which has been thrown out causes the death of a person, the person who did it . . . will be liable to make good the damage that is done." *Book* 11, Title VIII., S. 1, Art. IV.

(*d*) *Puffendorf* says: "The unjust slayer was obliged to defray the charges of physicians and chirurgeons, and to give to those persons whom the deceased was, by a full and perfect *duty*, bound to maintain, as wife, children and aprents, so much as the hope of their maintainence shall be valued at."

Law of Nature, *Book* 3, *Ch.* 1, *Sec.* 7.

(*e*) And *Bell* in his great work entitled, "Principles of the Law of Scotland," Sec. 2029, says: "The law takes cognizance of the loss and suffering of the family of a person killed, and gives assythment, both as indemnification and as *solatium*. This was formerly taxed by the Barons of Exchequer, but in more modern times it is matter for the jurisdiction of the Court of Session. . . The right of action is with the wife and family of the deceased; *the division being like that of the goods in Communion.*"

XVI. In precise accord with these principles, are the decisions of the Admiralty Courts in the United States:

In the "*Sea Gull*" a libel was filed in the Admiralty by the husband claiming damages for the death of his wife, caused by a collision on the navigable waters of the United States. The late Chief Justice of this Court, after referring to the rule of the common law as traceable 'to the feudal system and its forfeitures,' approves the doctrine of *Cutting* vs. *Seabury*, 1 *Sprague*, 525, and quotes Judge *Sprague* as follows: 'It is not controverted that if a father be willfully and wrongfully deprived of the services, society and control of his minor son, he may maintain an action against the wrongdoer if the son survives; why, then, if the same wrong be done and aggravated by the death of the child, should his right of action be lost?' *Chase*, Chief Justice, then adds: 'It is difficult to answer this question, and certainly it better becomes the humane and liberal character of proceedings in admiralty, to give than to withhold the remedy, when not required to withold it by established and inflexible rules.' *Chase's Decisions*, 145. A decree was entered for the libellant for twenty-one hundred dollars."

XVII. In the "*Towanda*" the loss of life occurred in a collision "on the high seas, about twenty miles from Cape Hatteras." The libel was on behalf of the widow, the

allegation being that the negligence of the steamer caused the death of the husband. The proceeding was based wholly on the law and jurisdiction of the admiralty. Judge *McKennan* affirmed the decree of Judge *Cadwalader*, and awarded the libellant $1,500. "Whatever," he said, "may be the course of the decisions of common law courts touching this question, the better opinion seems to be that 'the humane providence which watches over the rights and interests of those who go down to the sea in ships, and do their business in the great waters,' ought to afford redress for all the injuries to which they are unlawfully subjected. The exercise of such a jurisdiction by courts of admiralty is at least consonant with 'natural equity and the general principles of law,' and with the benign spirit of English and American legislation on the subject." 34 *Leg. Int.*, 394.

XVIII. In the "*E. B. Ward, Jr.*," the precise question was, "Whether an action for damages for the loss of a human life caused by a maritime tort survives in admiralty." The collision was on the high seas, beyond the territorial limits of Louisiana. *Pardee, C. J.*, decided the question in the affirmative, and cited the opinion of Mr. Justice *Woods* in "*City of Houston*," who is reported to have said: "That to hold that a court of admiralty cannot redress such a wrong would be a blot on our civilization and a reproach to the admiralty law." (*a*) 17 *Fed. Rep.*, 456.

XIX. In the "*D. Reeves*," and "*The Charles Morgan*," the question also was, whether damages can be recovered for the wrongful death of a party, in a court of admiralty, independent of the statutory remedy? And the decision

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(*a*) Judge *Pardee*, misconceiving, it is humbly suggested, the effect of *Crapo* vs. *Kelley*, 16 *Wall.*, 610, *queried* whether, although the vessel was on the high seas, yet being wholly owned in Louisiana, and her home port being there also, recovery might not be had under the code of the State. He did not, however, put his decision on that ground.

was in accord with the preceding cases, and mainly on the ground that the question was no longer an open one in those courts. 5 *Hughes*, 89; 2 *Flippin*, 274.

XX. Cases in the admiralty arising under State statutes, (with two exceptions,) and cases in England arising under Lord Campbell's Act, are not cited, nor referred to in this Brief, because they do not affect the question presented on this *Record*. They are as far from it as "from the centre thrice the utmost pole."

XXI. The "*Sylvan Glen*," 5 *Fed. Rep.*, 335, and "*The Manhassett*, 18 *Fed. Rep.*, 918, however, require a single observation, because the precise point decided by those two cases seems to have escaped the critical eye of the Appellant's Proctor. That point is, that when a libellant invokes a court of admiralty to enforce the provisions of a State statute, he must stand or fall, by the terms of the statute. Accordingly, in the "*Sylvan Glen*," where a libel *in rem* was filed, to recover damages, under the statute of New York, for a death caused by the negligence of a steamer, in navigating the East River, it was held, that inasmuch as the statute gave a right of action *only* against "the *person* who, or the *corporation* which," caused the death, a libel *in rem* could not be maintained. If the libel had invoked the law and jurisdiction of the admiralty alone, the well-known learning and experience of Judge *Benedict*, would undoubtedly have assured a different result.

XXII. In "*The Manhasset*," which was a libel *in rem*, filed in the admiralty by the administrator of the deceased invoking a statute of Virginia, *identical with that of New York* Judge *Hughes* refused to sustain it. It is matter of regret, however, that the appellants did not deem it useful to quote the language of Judge *Hughes* in dismissing the libel. That omission must be supplied: "I have already virtually ex-

pressed the opinion," said the learned Judge, "that the widow of the deceased man, Black, and his minor children, have a right of action, by libel, *in rem*, against the ferry-boat 'Manhasset,' in their own name, for their own benefit. Such a libel may be joint. The decision of Chief Justice *Chase* in the case of '*The Sea Gull*,' *supra*, establishes the validity of such a libel in this circuit. *I would maintain its validity independently of that precedent.* Such a right of action is a maritime right conferred by the general law maritime, * * and is not limited as to time by the twelve months' limitation of the State Statute. If a libel of that character is brought, I will entertain it."

XXIII. The case of *Hubgh* vs. *R. R. Co.*, 6 *La. An.*, 498, and the case of *Herman* vs. *R. R. Co.*, 11 *La. An.*, 5, also require a passing comment. The action in each case was based on "*Article* 2294" of the Louisiana Civil Code, and the decision turned on the construction and interpretation of that article. The article was copied from the *Code Napoleon*, and was identical with the corresponding article in that code. The French *Court of Cassation* had held that it gave redress to the personal representatives of a deceased for the wrongful loss of his life. The Court in *Hubgh* vs. *R. R. Co.* held otherwise. The question was again discussed in *Herman* vs. *R. R. Co.*, and in this, as in the former case, there was a great parade of authorities "of learned length and thundering sound," but on the principle of *stare decisis* the prior decision was maintained. The Court, however, said: "Were the question *res nova*, we should feel great difficulty in arriving at a satisfactory conclusion." But whether the *Court of Cassation*, or the Louisiana Court was right, or whether, in the discussion *Partida* or *Pothier* was to be considered the better authority, is not important. The error of the Court was corrected by the wisdom of the Legislature, and the Revised Code of that State contains this article:

Article 2,315. "Every act whatever of man that causes

damage to another, obliges him, by whose fault it happened, to repair it. The right of this action shall survive, in case of death, in favor of the minor children and widow of deceased, or either of them, and in default of those in favor of the surviving father and mother, or either of them, for the space of one year from the death."

The local law of Louisiana is thus put in harmony with the law of the admiralty, and if a person is now killed by the negligence of a railroad in that State, his dependent family can recover damages for the loss thereby sustained, precisely the same as if the death had occurred by a similar tort, on the high seas, or navigable waters of the United States.

XXIV. The early American text-writers are unimportant in this discussion, as they have not, for the most part, seriously considered the question presented by this *Record*, and are not sustained by the authorities on which they rely. *Dunlap*, for example, cites *Penhallow* vs. *Doane* 3, *Dallas* 54: *Dobson* vs. *Scott*, 2 *Roll's Rep.*, 18, and *Pollexfen* vs. *Pollexfen*, 2 *Lev.*, 6, to support the statement, in two lines, that an action for the death of a person does not survive. Those cases are simply to the effect, that in admiralty, and civil law, and spiritual courts, an action does not *abate* by the death of a party pending the action or pending an appeal. *Ex uno disce omnes.*

XXV. It is suggested by the appellant's proctor, that difficulty may arise, in cases of this character, in determining "who are entitled to recover, and in what manner and proportion." The answer is obvious. This is not the administration of an estate; it is a claim for damages by the wife and child for a wrong *they* have suffered. Emma S. Rickards and Mary C. Rickards, the libellants, are citizens of Delaware. The Court, no doubt, will take judicial notice that the state of marriage exists in that

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Article 2315. "Every act whatever of man that causes

damage to another, obliges him, by whose fault it happened, to repair it. The right of this action shall survive, in case of death, in favor of the minor children and widow of deceased, or either of them, and in default of those in favor of the surviving father and mother, or either of them, for the space of one year from the death."

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XXVI. It is said that the libellants are barred by the statute of limitations, either of Massachusetts or of Pennsylvania. The notion that a vessel on her voyage, and passing along the shores of a State, (the collision in question, occurred off the coast of Massachusetts), becomes, by some invisible operation, subject to its statute of limitations, (and if to its statute of limitations, why not to all its statutes?), is not *understandable* by the ordinary mind. It fails to grasp it. The bar of the statute, so far as Massachusetts is concerned, will not, therefore, be considered. And the statute of Pennsylvania is wholly inapplicable. The libellants are not proceeding under any statute of Pennsylvania, nor invoking the aid of any such statute; and they deny that any statute of the State giving redress for loss of life by a tort, has any effect upon the high seas. And in any case, State statutes of limitation are not observed in the admiralty. And as they have not been so observed, since the adoption of the Federal Constitution, and as during all the intervening period, the Common Law Courts have had *con-*

current jurisdiction with the Courts of Admiralty, "in all cases," where the common law is competent to give a remedy, it would seem too late to turn backward the current of decision and to discard the overwhelming weight of authority, upon the argument and opinion of counsel, however eminent, and justly eminent, for zeal and learning.

XXVII. This Court, in the "*The Key City*," 14 *Wall*, 660, states the result of the authorities in the following propositions :

(*a.*) "That while the Courts of Admiralty are not governed in such cases by any statute of limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defence."

(*b.*) "That no arbitrary or fixed period of time has been or will be established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that suit."

(*c.*) "That where the lien is to be enforced to the detriment of a purchaser for value, without notice, there will be a more rigid scrutiny of the delay, than when the claimant is owner at the time the lien accrued."

In view of these propositions, the finding of fact and the conclusions of law by the Court below on this question of the statute of limitations, are, it is respectfully submitted, a complete answer to the contention of the appellants :

(*a.*) *Finding of Fact.*

1. "*No innocent rights to or in the said steamer have arisen between the date of said collision and the exhibition of the libel.*"

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(*b.*) *Conclusions of Law.*

2. *"The right of the libellants does not depend upon the statute law of either the States of Massachusetts or Pennsylvania, and the limitation of one year in the statutes of those States does not bar this proceeding."*

3. *"As there are no innocent rights to be affected by the present proceedings and no inconvenience will result to the respondents from the delay attending it, the action, if not governed by the statutes aforesaid, is not barred by the libellants' laches."*

HENRY FLANDERS,
Proctor for Appellees.

March, 1886.